

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-6011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6011

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

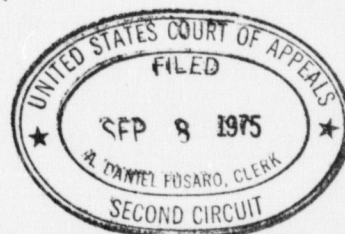
HEALTHCO, INC.,

Defendant-Appellee

ON CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

VOLUME II



PAGINATION AS IN ORIGINAL COPY

You can be excused, Mr. Guterman. Thank you.

(Witness excused.)

MR. SIRIGNANO: I would like to call Dr. David Schwartzman to the stand.

DAVID SCHWARTZMAN, a witness called on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIRIGNANO:

Q Mr. Schwartzman, will you state your profession, please?

A I am a professor of economics.

Q By whom are you employed?

A The New School for Social Research.

Q Will you state your academic background, please?

A I have a Phd in economics from the University of California at Berkeley.

THE COURT: The New School is on 12th Street?

THE WITNESS: That is right. I actually teach at 14th Street and Fifth Avenue, where the building happens to be.

THE COURT: They took over Bond's?

THE WITNESS: No, it was Lane's Department Store.

THE COURT: Now I am oriented.

Q Will you describe your background and teaching, please?

A I have taught courses at the graduate level in the fields of price theory, industrial organization, statistics -- mainly in those areas.

Q How long have you been in this field, Dr. Schwartzman?

A I received my degree in 1953, my Phd degree in 1953.

Q Have you published in this field?

A Yes, I have.

Q Describe some of your publications?

A I have a book called Oligopoly in the Farm Machinery Industry, and I have also written another book called The Decline of Service in Retail Trade.

THE COURT: The Decline of Service in Retail Trade.

THE WITNESS: Yes.

THE COURT: Well, I certainly would want to read that, because it is certainly an obvious phenomenon; there is very little service in the retail trade anymore.

Q What in addition to the books have you written?

A I have written articles in economics for various journals. I have written an article in '58 which was called

1 The Effect of Monopoly on Price, which was published
2 in The Journal of Political Economy, put out by the
3 University of Chicago Press; another article called
4 The Burden of Monopoly in the same journal in 1960; and since
5 then I have written quite a large number of articles.
6

7 I have written in the Antitrust Bulletin. A
8 recent piece that I did was called The Expected Profits
9 Criterion of Monopoly Power.

10 Q Have you done consultant work apart from your
11 academic work?

12 A Yes, I have. I have acted as a consultant
13 to the Royal Commission on Farm Machinery in Ottawa,
14 Canada when I did my study of the farm machinery industry,
15 and I have done other consulting as well.

16 Q That consulting has also included consulting
17 with the Antitrust Department in connection with this case?

18 A Yes, I have been consulting with the Antitrust
19 Division on this case.

20 Q Dr. Schwartzman, can you tell me whether the
21 term "relevant market" has a recognized meaning within
22 the discipline of economics?

23 A Yes, it does.

24 Q What is that meaning?

25 A Well, I would like to break it down into two

words, market and relevant.

MR. JINKINSON: Your Honor, I am going to object to this line of interrogation because it calls for an opinion and conclusion of the witness, and, too, it is an attempt to usurp the function of this Court, whose duty it is to determine the relevant market in this case.

THE COURT: Well, I will give you a standing objection to the testimony of the doctor, but I am going to take it, Mr. Jinkinson, and I will treat your objection as going to its weight.

MR. SIRIGNANO: May I have a reply to that?

THE COURT: No, I don't think you need reply to it.

A Well, if I could go on, then.

A market consists of those sellers that compete with each other, so that if one or more sellers reduce their prices, then the other sellers in the same market will lose sales to the sellers who reduce their prices.

Now, when we say "relevant," what we are referring to in this case is the acquisitions that we are discussing in the suit, so we would talk about the market in which these particular sellers were competing prior to the acquisition.

Q Dr. Schwartzman, have you had an opportunity to become acquainted with the evidence which has been presented in this court?

1
2 A Yes, I have read the testimony that was presented
3 here and I have seen some of the exhibits.

4 Q Have you seen all of the exhibits?

5 A Yes, I have.

6 Q On the basis of your study of that evidence have
7 you been able to come to an opinion as to what is a
8 relevant market for the purpose of evaluating the effect
9 of competition as a result of the acquisitions which are the
10 subject matter of this action?

11 A Yes, I have, I have come to an opinion on that
12 matter.

13 Q What is your opinion?

14 MR. JINKINSON: Objection, your Honor.

15 THE COURT: I will take it over your objection.
16 You can have a standing objection to this. Overruled.

17 A I would say that the relevant market in this
18 case consists of all the firms who supply service, such
19 as is supplied by the dental dealers in the metropolitan
20 area of New York.

21 Now, if I could go on to explain, I want to
22 emphasize the aspect of service, because it seems to me
23 that the dental dealers involved in these acquisitions
24 were supplying a good deal of service in conjunction
25 with the products which they were selling, so that I would

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2 include any firms in the relevant market who supply
3 these types of services.

4 Do you want me to go on?

5 Q If you please. Will you state any other facts
6 upon which you come to this conclusion?

7 A Yes. Well, when I was looking at the types
8 of services that the dental dealers supplied, it seemed to
9 me that these included the following:

10 They sold two classes of products -- equipment,
11 which includes X-ray machines, drills, chairs and other
12 items which were large, durable pieces of equipment, and
13 whose prices were in the range of about a hundred dollars
14 per unit.

15 They also sold sundries, and these sundry items
16 were items which were consumed by dentists in their
17 practice. These included teeth, precious metals and
18 parts. And there were other items as well.

19 Now, the services that the dental dealers
20 supplied included the maintenance of stocks of sundries,
21 so that they provided the dentists with the selection
22 of items; this included providing information to dentists
23 about what was available both in the way of equipment
24 and in the way of the sundries.

25 They provided services in connection with the

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2 equipment. They advised the dentists concerning the
3 type of equipment that he might want; they advised him
4 concerning the lay-out of his office; they also
5 provided repair service on the equipment.
6

7 They provided, in addition to that, quick
8 delivery, which seems to be of some importance to dentists;
9 they provided credit, and, finally, they provided a kind
10 of personal service which they were able to do by
11 becoming familiar through direct contact of his needs.
12 The dentist did not have to describe in great detail what
13 he wanted; he would let them know he needed a particular
14 item, and they would be able to supply him with exactly
15 what he wanted because they knew him.

16 Now, there is a problem in defining any market in
17 that it is not a black and white matter. There are
18 gradations of the degree of competitiveness between
19 different sellers. Some sellers are more closely
20 competitive with one another than other sellers are, and yet
21 you can still apply the same words. It is not a sharply
22 defined concept. This is the reason sometimes we talk
23 about segments of the market or sub-markets.

24 Now, in this particular industry it seems to me
25 that for certain types of services it is difficult
for dentists to obtain them from other sources than the dental

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2 dealers. This includes the installation service
3 associated with the equipment. He could conceivably
4 go to a manufacturer himself and get a direct shipment,
5 a direct sale, and he could conceivably obtain the services
6 of a repairman to install the equipment. But this would
7 involve a good deal of trouble. So usually for that reason
8 he uses a dental dealer who sells the equipment and supplies
9 the installation and also accepts responsibility for
10 maintaining it and keeping it in repair and so on. So
11 this is an area in which it is very difficult for another
12 type of seller, another type of firm, to be competitive
13 with dental dealers.
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2 There are other areas as well in which it is
3 difficult, the advice that they can offer which is possible
4 because they get to know the dentists and they have a wide
5 assortment of goods, a wide assortment of sundries. The
6 quick delivery is also difficult for other types of sellers.

7 Now, there are some overlaps, of course, and
8 I want to say a few words about this. Apparently in certain
9 types of sundries, in any case, mail order houses do supply
10 them and they circulate flyers to the dentists who then can
11 order on the basis of these flyers certain types of sundries
12 and this does provide some competition to the dental dealers.

13 I would say, however, that the type of competi-
14 tion provided by mail order houses is not as great as that pro-
15 vided by other dental dealers because they don't supply
16 the same services, which I have already mentioned.

17 So I would be inclined myself to keep them out
18 of the market, not to recognize the mail order houses as
19 being part of the market. I would restrict the market
20 myself, in my own opinion, to dental dealers alone.

21 Now, the other important aspect that has to be
22 recognized is the geographic aspect of the market.

23 Now, it seems to me that this market is a
24 local market because it does depend on direct contact
25 between the dealer and the customer a great deal. Salesmen

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desb-2

Schwartzman-direct

can't travel great distances and the personal element, the personal service element, as I have said, is important.

It also is important in connection with repair service. It is difficult for the dealers to send repair men great distances.

So that the market is highly local.

Now, from an independent inspection of an exhibit relating to the geographic extent of the market that dental dealers sell in and also from reading some of the testimony, it does seem to me that the dealers do supply -- dealers located in any part of the metropolitan area supply other parts of the metropolitan area and there are overlaps between the Westchester, Jersey, the boroughs, and on Long Island.

So that I would include all of these in the geographic market.

So that I would for these reasons say that dental dealers located in the metropolitan area of New York are the relevant market.

Q Do you have any opinion as to any sub markets of that market?

A I would say that the dealers who sell sundries only rather than provide a full line of merchandise constitute a sub market, and full line dealers might be considered another sub market.

MR. SIRIGNANO: Your witness.

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desb-3

Schwartzman-cross

MR.JINKINSON: May we have a short recess,
your Honor?

THE COURT: All right, we will take a few minutes.

(Recess.)

CROSS-EXAMINATION

BY MR. JINKINSON:

Q Dr.Schwartzman, you said you read the entire
record in this case?

A I read the testimony.

Q The testimony?

A Yes.

Q Did you read the pleadings?

A I read --

Q The complaint?

A The complaint and the plaintiff's brief.

Q Did you read the pretrial order entered in this
case?

A Yes, I read the pretrial order.

Q In Paragraph 3 it states as follows: "Within
the dental profession dental dealers are a recognized class
of sellers of dental products consisting of persons or
companies regularly engaged in the purchase of a wide variety
of dental products primarily for resale to the ultimate
consumers of said products."

desb-4

Schwartzman-cross

1 THE COURT: Excuse me, where are you reading?

2
3 MR. JINKINSON: Page 8, I believe it is, of
4 the pretrial order, your Honor. I am reading 3-I, Plaintiff
5 contentions, middle of Page 8. It is Roman numeral III, but
6 the small Roman numeral iii. It is in Paragraph 3B.

7 THE COURT: 3B, that is on Page 7.

8 MR. JINKINSON: Then turn to Page 8, your Honor.
9 See the Roman numeral iii?

10 THE COURT: Yes, the little 3. I have it.

11 Q "Dentists, dentists' laboratories, institutions
12 and Government agencies."

13 Now, do you agree with that definition?

14 MR. SIRIGNANO: Objection, your Honor.

15 THE COURT: Overruled.

16 A I would add to it. I would say that it includes--

17 Q Just answer my question. Do you agree with it?
18 Then you can make any explanation you want to, Doctor.

19 A Well, I would disagree with that.

20 Q You disagree with that. Now you can give your
21 reasons for disagreeing.

22 A The reason I disagree is that I would consider
23 a dental dealer those companies who also supply the services
24 as well as the goods, and it is only the goods that are
25 mentioned in that definition.

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Schwartzman-cross

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Q That is the only disagreement?

A That is right.

Q You would include services?

A That is right.

Q Now, if a company was operating strictly for the purpose of selling services would you include him as being a seller in the market?

A No, then I would not, because if he only supplied the services he would not be selling the goods. I would say that he should sell both before he is considered a dental dealer.

Q As I understood your testimony you are of the opinion that only the dental dealer with his full line can sell equipment and install it for a dentist?

A It would be difficult for a firm to sell the equipment and supply the service at the same time for any other type of seller to do that.

Q Isn't there businesses operating in New York City, in the metropolitan area, who do nothing but install and service equipment?

A I don't really know.

Q Then you didn't read the testimony of Mr. Walter on Page 112, when he was asked the question: "Well, you say in the sale of heavy dental equipment like chairs and

1 desb-6

Schwartzman-cross

2 such units, that one of the advantages you have is because
3 you furnish the service?

4 "A Correct.

5 "Q Now, there are places of business, people in
6 New York City, firms which furnish dental repair and whatever
7 needs to go with the service of equipment?

8 "A Yes.

9 "Q And the dentist can order all the things he
10 needs to furnish his office and hire one of those shops that
11 furnish dental repair and service without the necessity of
12 going to a full line dentists supply house?

13 "A He could?

14 Do you disagree with Mr. Walter?

15 A No, I don't.

16 Q I see. Now, if I have your testimony correctly
17 it seems that mail order houses can't furnish those kinds
18 of services?

19 A That is right.

20 Q And they don't sell equipment, heavy equipment?

21 A Not as a rule. There may be one or two that do
22 but I don't believe from reading the testimony that this
23 is common.

24 Q I see. Now, Mr. Walter, if you read his testi-
25 mony closely, in my opinion, identified a large number of

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Schwartzman-cross

1 sellers who compete with him. Do you recall that testimony?

2 A Yes.

3 Q Did you also notice that those sellers were not
4 identified in any of the surveys taken by the Government?

5 A No, I don't recall that.

6 Q You don't recall whether the Government omitted
7 many of those people identified by Mr. Walter?

8 A I don't recall that.

9 Q Have you seen the charts, Plaintiff's Exhibits
10 32 to 36?

11 A Could you refresh my memory? I have seen the
12 charts but could you refresh my memory on that?

13 MR. SIRIGNANO: I would like to object to this
14 entire line of questioning as there having been no foundation
15 laid for certain of the assumptions stated in Mr. Jinkinson's
16 questions to the witness.

17 THE COURT: I will overrule the objection.

18 Q I hand you, Doctor, the copies of 32 to 36. I
19 don't know where the originals are.

20 A Yes, sir.

21 Q In addition to those documents I am going to
22 hand you Plaintiff's Exhibits 37 to 40, inclusive, will you
23 glance at those, Doctor.

24 A Yes, sir.

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Schwartzman-cross

Q Now, my question to you, Doctor, is this: Do any of those charts, as I have shown you from 32 to 40, inclusive, define a relevant market by your definition?

MR. SIRIGNANO: Objection, your Honor.

THE COURT: What is the ground of the objection?

MR. SIRIGNANO: The question is unanswerable in terms of the material that is before the witness at this moment. The charts do not purport --

THE COURT: If so, he can tell us that.

A Well, I don't know whether the list of dental dealers that is mentioned here is complete, so I don't know if it defines the relevant market from that point of view. I don't know either whether all of the names on this list are for dental dealers as I have defined them, namely dealers who sell the equipment and sundries at retail and also supply service.

Q Can you tell from those exhibits whether mail order houses are included therein?

A I don't know. I can't tell whether they are.

Q Now, I am going to show you --

THE COURT: Doctor, your market wouldn't include mail order houses, would it?

THE WITNESS: No, I wouldn't include mail order houses.

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2 Q I want to show you Plaintiff's Exhibit 31, 31A,
3 and Exhibit 44 (handing). My question to you is have you
4 seen those and have you studied them?

5 A I have seen a few of them. I haven't looked
6 at all of them but I looked at a few of them.

7 Q A few of them?

8 A Yes.

9 Q All right. Now, do mail order companies offer
10 credit to your knowledge?

11 A I don't know what the terms of credit are that
12 they offer.

13 Q How does the delivery time differ between mail
14 order companies and full service supply dealers, if any?

15 A Well, as I understand it, the dental dealers use
16 services such as United Parcel Service.

17 Q Do you have some testimony that mail order
18 houses do not use Parcel?

19 A As I understand it they use the United States
20 mail.

21 Q Only mail?

22 A I don't know if they only use mail, but I gather
23 from the testimony principally on mail.

24 Q Now, Dr. Schwartzman, how does the Census Bureau
25 describe dental dealers you spoke of as comprising this
market?

1
2 A I don't know how the Census Bureau defines
3 dental dealers.

4 Q Isn't it a fact that the Census Bureau refers
5 to them as merchant wholesalers of dental equipment and
6 supplies?

7 A I don't know.

8 MR. SIRIGNANO: Objection, your Honor. The witness
9 has answered the question that he didn't know.

10 THE COURT: He doesn't have to take that answer.
11 He can ask him a question.

12 I will overrule the objection.

13 Q You don't know, your answer is you don't know?

14 A Could you repeat your question?

15 Q Well, isn't it a fact that the Census Bureau
16 refers to them, that is the dental dealers you described, as
17 merchant wholesalers of dental equipment and supplies?

18 A I don't know whether they do or not.

19 Q What does merchant wholesaler mean to you?

20 A It means someone who sells at wholesale, goods
21 at wholesale. Usually this means selling in large quantities
22 to retailers.

23 Q Isn't it possible to get the sales of dealers
24 through the Census Bureau's figures?

25 A I don't know whether it is possible to get these

1 figures.

2 Q You don't know?

3 A No.

4 MR. JINKINSON: I have no further questions.

5 THE COURT: Redirect?

6 MR. SIRIGNANO: No, your Honor.

7 THE COURT: All right, thank you, Doctor. You
8 may be excused.

9 (Witness excused.)

10 THE COURT: What is next for the Government?

11 MR. SIRIGNANO: Your Honor, I think the
12 plaintiff is just about prepared to rest, but prior to
13 doing so I would like an opportunity to confer with my
14 colleagues.
15

16 It would appear we are fairly close to the time
17 we take a luncheon break and I wonder if we could break for
18 lunch now and perhaps coming back slightly earlier, at
19 which time I anticipate the plaintiff will rest.

20 THE COURT: Well, we will have to come back at
21 2:15 because I have made my plans on the assumption that
22 we would have luncheon from 12:45 until 2:15.

23 MR. SIRIGNANO: If I may have a five-minute
24 recess, your Honor, to confer with my colleagues.

25 THE COURT: All right.

* * * *

I will call Mr. David Allen Ellis.

DAVID ALLEN ELLIS, called
on behalf of the Defendant, being first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JINKINSON:

Q Where do you reside, Mr. Ellis?

A 1517 Lemon Tree Lane, Silver Springs,
Maryland.

Q Are you employed?

A Yes.

Q By whom are you employed?

A The American Dental Trade Association.

Q Will you trace the course of your educational
background?

A I have a Bachelor's Degree in Mathematical
Statistics from George Washington University, and I did
some graduate work in the same field.

THE COURT: Washington University is in
St. Louis?

THE WITNESS: George Washington in Washington, D.C.

THE COURT: I am sorry, from George Washington
University.

Q Trace your business career, please, for the Court.

1
2 A Since 1957 I have been the Director of
3 Statistical Services for the American Dental Trade
4 Association; from 1950 to 1957 I was analytical statistician
5 and systems analyst with the Bureau of Labor Statistics.

6 Q The Bureau of Labor? That is the department of
7 Labor?

8 A Yes.

9 Q Of the United States Government?

10 A That is correct.

11 Q Prior to that?

12 A I was in the military service.

13 Q So you have been in statistical work for a number
14 of years?

15 A More than 20.

16 Q Did I ask you by whom you are presently employed?

17 A I believe so.

18 THE COURT: By the American Dental Trade
19 Association?

20 THE WITNESS: Yes, sir.

21 THE COURT: What is your job there?

22 THE WITNESS: I am the director of statistical
23 services.

24 THE COURT: Director of statistical services?

25 THE WITNESS: Yes.

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Q For how long have you held that position?

A Since 1957.

Q Describe your present duties with the American Dental Trade Association?

A We prepare a large number of reports describing the industry; we are a vertical trade association, combining both manufacturers and distributors in the industry, therefore, probably, the variety of material we prepare is more than with most trade associations.

For manufacturers we have a monthly sales index, we do a monthly credit report on the status of dealer sales, dealer credit, we do periodic surveys of equipment shipments; we do surveys of salesmen's salaries; we have done fringe benefit surveys; we have done surveys of employees and manufacturing plants by various job classifications, and whatever surveys might be required for the manufacturers section.

For dealers, we prepare sales trend reports; we prepare an annual operating ratio study; we publish allied bulletins on average sales per salesman annually, and occasional surveys which are not scheduled regularly.

Q How many dealer outlets does your association represent?

A About 300.

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1 THE COURT: What does a dealer outlet mean?
2
3 How many dental dealers are members of the association?

4 MR. JINKINSON: Yes.

5 THE COURT: About 300 dental dealers?

6 THE WITNESS: Yes, sir. There is a slight
7 discrepancy in terms. Some companies have more than one
8 outlet, and the question posed was how many outlets. The
9 answer is three hundred.

2/ 10 Q Do you have an estimate as to the number of dental
11 dealers in the United States?

12 A Yes.

13 Q How many are there?

14 A I believe there would be between 650 and 700 at this
15 time.

16 Q Have you been requested to make a study of dental
17 products by dentists in the metropolitan market?

18 A Yes.

19 Q Who requested you to make such a study?

20 A Well, originally this request came into our
21 executive vice president by a telephone call from the
22 company that was in Health Care, and they asked that we
23 prepare an estimate of the dental market in New York City,
24 and our executive vice president relayed that message to me,
25 and I had several questions: What is the circumference of

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New York City? Which definition should this include?

And several other fairly technical questions. And he said,

"Why don't you call Mr. Michael Siker at Health Care in London and determine what it is he wants."

I called Mr. Siker and he told me that he wanted an estimate for Metropolitan New York. Frankly, at the time I didn't know that there was litigation of any kind pending. We do get that kind of request frequently.

Q Is that a usual request by a member?

A No. I did a similar analysis for a gold manufacturer in New Rochelle, New York.

Q Have you been requested by counsel in this case to make a study of the purchases of dental products?

A I have.

Q By dentists in the Metropolitan area?

A Yes, sir.

Q How many manufacturing members do you have?

A About 84.

Q Do you have any opinion as to how many manufacturers there are nationally?

A I would judge there are perhaps as many -- well, probably more than a thousand.

Q What do you base your estimate on?

A Five or six years ago in collaboration with the

American Surgical Trade Association we set out to develop a coding structure whereby we would have a code number assigned to every manufacturer of surgical or dental supplies in the United States. For some years they have been doing this with surgical manufacturers, and we found that a large number of the companies to whom they had been assigning numbers also manufactured dental products.

In the course of attempting to identify manufacturers to prepare this code list, I myself identified more than 900.

THE COURT: So of the more than 900 only 84 belong to your association?

THE WITNESS: That is correct, but we believe their dollar volume is about 2/3 of the dollar volume done by all the manufacturers.

THE COURT: And you told us that your dental dealer members had about 300 outlets?

THE WITNESS: That is right.

THE COURT: How many dental dealer members do you have.

THE WITNESS: In company designation?

THE COURT: How many companies?

THE WITNESS: It is about 64.

THE COURT: About 64?

THE WITNESS: Yes.

THE COURT: And these 64 companies have 300 outlets?

THE WITNESS: Approximately.

THE COURT: And you believe that there are six or 700 dental dealers in the United States?

THE WITNESS: Yes.

Q Mr. Ellis, what kind of information do your dealer members send to you or do you use?

A Do they send to us? Well, I mentioned the types of reports that we prepare, and they send in sales figures, quarterly and annually, accounts receivable data; once a year we request information similar and comparable to a profit and loss statement, and we prepare an operating ratio study based on this. And from time to time for special surveys we may collect some other form of data as it is needed.

Q Aside from the information sent in, do you have other contacts with your members?

A Of course.

Q Do you visit with your dealers?

A Yes.

Q Are the sellers of dental products retailers and wholesalers?

A No, at the dealer level they are wholesalers.

THE COURT: Excuse me.

Why do you say that, Mr. Ellis.

THE WITNESS: Because every industry in this country is defined in a manual used basically throughout all research and government and that is the Standard Industrial Classification Manual, and dental dealers are classified in that manual as classification number 50861, which is a wholesale trade designation.

THE COURT: Well, frankly, I think of a wholesaler as one who sells for resale; the wholesale grocer sells grocery products to a retail grocery store for resale to the public which consumes it, and the dental dealer sells to dentists and to dental laboratories, neither of which resell the product; they consume it? Isn't that right?

THE WITNESS: Well --

THE COURT: I am sure you are correct in what you say about the classification in the Census Bureau.

THE WITNESS: Well, this is not only used by the Census Bureau, this is used across the government. I think the problem may be, for example, that I believe there is a federal law that does not permit dental laboratories to sell to the public, so in a sense in that area there may not be a retail level. But this is not the only industry that falls in this category. Surgical

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supply stores and architect suppliers also do -- there are a number of them fall in the same group.

Q Are you familiar, Mr. Ellis, with the manner and way in which dental products are sold?

A Yes.

Q How are they sold?

A Well, they are available from a number of sources. They are available from what would be called the full service dealer, the full line dealer; they are available from catalog suppliers or mail order houses, they are available on direct sales from manufacturers in some instances; they are available from, particularly in the laboratory market, some manufacturers who have franchise laboratories and sell their products as well as the technique to use them to these franchise laboratories.

Q Importers?

A Yes, if they are at the wholesale level, there are some.

Q What do you understand by the term multiple use goods?

A Well, there are some goods by their nature that can serve more than one purpose. For example, a box of Kleenex, every dental office would have one, probably every physician's office, too, and yet these are

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obtainable from a dental supply establishment; there is gauze and other products that fall in that category, paper products, paper towels and so forth.

Q In the past 10 years has there been any change in the way dental products are distributed?

A Yes.

Q What are those changes, if you know?

A There seems to be an increase in the distribution of supplies by mail order.

Q That is, supplies to dentists?

A That is correct.

Q An increase in dental products supplied to dentists?

A That is correct.

Q Have you observed any changes in the customer purchasing habits?

MR. SIRIGNANO: Your Honor, I don't believe any foundation has been laid for this particular line of questioning. I object.

THE COURT: I am going to take it.

You know, Mr. Sirignano, I have been extremely liberal since we don't have a jury here. You can argue to me perfectly well that I shouldn't give it any credence. I am not saying you are wrong when I say I will take it.

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Q Do you have the question, Mr. Ellis?

A I am sorry. Could you repeat it, please.

Q Have you observed any changes in the customer purchasing habits?

A Yes, I have.

Q What changes have you observed?

A Well, I recently did an analysis which contrasted dental dealer sales against purchases of dentists as enumerated by the American Dental Association, and over the period from 1961 to 1962 there was a considerable increase in dentists' purchases versus sales of dental supplies. I have the figures here if you wish them.

THE COURT: You mean sales of dental supplies by your members?

THE WITNESS: Yes.

MR. SIRIGNANO: Your Honor, at this point I want to raise an objection to any testimony given by this witness on the basis of surveys conducted by the American Dental Association as the rankest type of hearsay. They were not surveys which were conducted by this witness; they are not surveys to which the government ever had any access in terms of pressing the validity, and I believe that this witness is not in a position to testify to the accuracy of any of those surveys, and he should not be permitted to

testify to conclusions based upon such surveys without
a foundation being laid as to the propriety of those
surveys.

THE COURT: Let's deal with that matter when we
come back after lunch.

We will be in recess until 2:15.

Will you be here, Mr. Reporter, so that you can
read me what has happened and I will take care of it then.

(Luncheon recess taken.)

2 AFTERNOON SESSION

3 2:15 p.m.

4 D A V I D A L L E N E L L I S , resumed.

5 THE COURT: You may proceed.

6 MR. JINKINSON: There was a pending objection.

7 THE COURT: That is right. Mr. Reporter, you were
8 going to read me that portion.

9 (Record read.)

10 THE COURT: I think I will overrule the objection,
11 but, of course, the government can cross examine this
12 witness and can (subpoena the American Dental Association.)
13 We can go into it fully. I will permit it.

14 DIRECT EXAMINATION (CONTINUED)

15 BY MR. JINKINSON:

16 Q Your organization, the American Dental Trade
17 Association, and the American Dental Association have a kind
18 of a liaison between the two?

19 A Well, there is a mutual respect, a very closely
20 liaison.

21 Q Have you seen reports made and used by the
22 ADA?

23 A Many times.

24 Q Do you use them in your work?

25 A Frequently.

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Q Are they trustworthy, as far as you are concerned?

A I think they are the definitive information source on dental practice. I have known Duane Moen, the director of economic research there, since 1957. He is a highly qualified individual. I think his work is meticulous --

MR. SIRIGNANO: I object. ,

THE COURT: Oh, Mr. Sirignano, I have been on the bench 11 years and I have practiced law for 30 years. Don't worry. I take it with a grain of salt. Of course, it's not going to affect the result. Go ahead.

Q My question to you, Mr. Ellis, is whether or not you have observed any changes in the purchasing habits of dentists?

A Yes.

Q What are those changes that you have observed?

A Well, possibly this is a reflection of our times, but dentists have become cost conscious and they are today purchasing materials, supplies, equipment from a variety of sources. By analyzing their purchases, the trends of their purchases for the last 10 years we find that the trends of their purchases as contrasted to the sales of dental dealers as measured by our index of sales, that

dentists' purchases are rising at a faster rate than our dealer sales.

Now, I would like to point out something about our members' sales. I believe they are reliable estimates, or have been in the past of the national pattern.

In the Census of business from '63 to '67 there was an increase in sales by dental dealers. I took the 1963 Census data and applied that to the increased percentage in sales by dealer members from whom we collected data to that figure to extrapolate, to '67, several years before the Census data was released.

When the data was published for a total of about \$238 million, 1967, our figures or our estimate was about \$300,000 over. This is a very small percentage of error. I cannot testify to that same relationship at the present time, because although there was a Census of business done in 1972, those data have not been released, and the probability is they will not be available for this particular group of suppliers 'til perhaps next fall, the fall of '74.

THE COURT: And I suppose that if you find that dentists are purchasing a certain amount of supplies and you find that your members are selling lesser amount in dollars of supplies, the dentists must be getting the

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2 difference from some source other than your members?

3 THE WITNESS: That is my conclusion, your Honor.

4 THE COURT: And probably you think they must
5 be getting it from mail order houses?

6 THE WITNESS: Probably the majority is, but
7 as I enumerated also earlier, there may be other sources;
8 some manufacturers will sell direct.

9 MR. JINKINSON: May I have plaintiff's Exhibit 3?

10 Do you have that?

11 MR. LUBLINSKI: This is not actually marked.
12 This is a copy.

13 THE COURT: Is this for the record?

14 MR. JINKINSON: I asked for Plaintiff's Exhibit 3,
15 and they agreed that this is identical with it.

16 Q I show you Plaintiff's Exhibit 3, or a document
17 similar to the one marked Plaintiff's Exhibit 3.

18 Do you recognize that?

19 A Yes, I do.

20 Q Did you have anything to do with the preparation
21 of it?

22 A Yes. I was the editor of the last
23 edition, and three of us essentially wrote this version of
24 it.

25 Q Was Plaintiff's Exhibit 3 or a version of that in

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existence at the time you came with the ADT?

A Oh, yes, the first edition was published in 1921.

Q Did you make any changes in it when you came with ADT?

A Yes, to some extent. I believe I came there in 1957. We did a revision in 1961, and a revision in 1967.

Q What is Plaintiff's Exhibit 3 in your words?

A The title is Standard Manual of Accounting for Dental Dealers. I suppose in technical terms it is not a manual; it doesn't tell you how to do accounting. In more general terms it would be a chart of accounts both expense accounts and income account to dental dealers.

Q Do you urge your members to use that in the reporting of statistics to ADT?

A Oh, yes, we think it is very important, and I suppose that is one reason why very early in the association it published this, in order to get comparability of data. We feel there has to be an underlying basis of definitions, of commonality of terms.

Q Mr. Ellis, I want to return to the question this morning in which we were talking about the merchant

wholesaler. I want to first show you a copy of Plaintiff's Exhibit 20, which has been offered and received in evidence.

Do you recognize that document?

A Yes. It is a report from the Census Bureau, from the Census of Business of 1967, and this particular one is a breakdown by kind of business of merchant wholesalers.

Q That term, "merchant wholesalers," is recognized by the Census Bureau?

A Of course. Well, it is on the document. Of course it is.

Q Let me ask you this question: Apart from the fact that dental dealers are treated as wholesalers by the Bureau of Census, are there commercial reasons why they should be so classified?

A I think so. This morning when the question was put I didn't realize there was any sort of dichotomy or debate about this, but, first of all, yesterday in our office inadvertently I came across some evidence which showed they had been classified as wholesalers at least since 1930.

Secondly, there are some practical reasons why they would be classified as wholesalers.

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3 First of all, I think I indicated that in most
4 instances they do not sell to the general public. However,
5 they do serve a sort of middle-man function between the
6 manufacturer and the dental laboratory or the dentist
7 themselves.

8 Perhaps you could say that the laboratory or the
9 dentist is the retailer source of the goods, since the
10 dentist might buy, for example, gold, place it in the
11 patient's mouth, and by charging his fee would be, in
12 effect, selling it to him. The laboratory, even though
13 they don't deal with the public may be in the same
14 position where they could buy teeth, fabricated
15 dentures or restorations, sell these to the dentist,
16 who then places it in the patient's mouth.

17 I am sorry that I didn't elaborate more on this
18 this morning. I didn't realize this was an area of
19 debate.

20 Q Mr. Ellis, are there differences between the
21 classes of terms in buying, let's say, in purchasing?
22 I am referring and directing your attention to government
23 agencies or institutions?

24 A Yes.

25 Q What are the differences?

A Well, generally -- you mean as contrasted to a

dentist in private practice?

Q Yes.

A Generally, the products that are sold to them are on a bid basis. In some instances, the bids will be taken at the national level.

In the Department of Defense, for example, many products are put in their catalog that way. Many of the products are stocked in government depots around the country, and they can be ordered by a dental clinic.

There are some items which they can pick up locally. I can't delineate them here, but I believe there are over 100. I know that artificial teeth, for example, is one of these, because maintaining a complete inventory with a complete set of all combinations, of shades and molds and sizes of teeth is too much even for the average government installation, and they tend to put some of these things up locally.

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2 Q Does the Government usually buy on a bid arrange-
3 ment?

4 A That is my understanding, yes.

5 Q In your opinion and in terms of commercial reality,
6 what is the appropriate method for analyzing the market for
7 dental products within any geographic area less than the
8 United States?

9 A First of all, it is a difficult problem to do
10 market analysis in this area. First, it is a very small
11 industry and for this reason the statistics are not always
12 clearly delineated.

13 Secondly, as I testified to earlier this morning,
14 there are a variety of sellers and buyers. I feel in one
15 geographic area it is a virtual practical impossibility to
16 be able to name all of the people who sell in that area and
17 to keep track of all the buyers who buy goods from them.
18 I believe the only practical method is to attempt to assess
19 customers' purchases. Principally because data are avail-
20 able that we can use to develop this.

21 Q That data is available?

22 A Yes.

23 Q And where would you find that data?

24 A Well, in a variety of places. I have been using
25 for some time surveys done by the American Dental Association.

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2 These surveys show average incomes of dentists, they show
3 average gross incomes of dentists. (They show on the average
4 for various geographic regions the proportion of dentists
5 gross incomes that are sent for supplies and show the
6 average amount of equipment that dentists purchase.) These
7 surveys are done every three years.

8 As I said before, I believe this is the only
9 practical solution to the problem, and I believe that this
10 is the basic document that one would use, this type of
11 survey done by them.

12 I would imagine, and I am not an attorney, I
13 would imagine the American Bar Association does a report on
14 attorneys' incomes and probably expenses.

15 Q Would it, in your opinion, be practical or possible
16 to survey the sellers to determine those sales of dental
17 products?

18 A I don't believe it would be practical. There are
19 just too many and they are located in too many diverse areas.

20 Q Are there any methods that might be more reliable?

21 A I am sorry, I believe that the method of
22 assessing purchases is probably the most practical. If,
23 however, you were going to try to enumerate the sellers within
24 a geographic region, then I believe that the census -- if
25 you were going to enumerate the sellers located in a geographic

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2 region on I believe the census data would be most reliable.

3 Q Then you have two sources you would rely upon,
4 the survey of purchases and the census data?

5 A Yes. I must point out in all instances census
6 bureau data are not always available.

7 Q Now, do those engaged in the dental industry
8 use purchase data?

9 A Yes. As a matter of fact since I have been
10 with the trade association we have done ourself three sur-
11 veys of dentists and these were under the sponsorship of
12 a committee called the Marketing Committee. After each
13 survey this committee had prepared by our staff a work sheet
14 that could be used by salesman or a dental supply dealer to
15 determine his potential in his marketing area. The
16 committee in each instance, after they had done the survey,
17 sent a member out to one of our regional meetings -- we have
18 anywhere from five to nine regional meetings a year, and
19 they did a paper on what the survey showed and presented
20 these work sheets for dealers.

21 Now, I don't know the full utilization of
22 them, but I do know that we have about 300 dealer members and
23 the last time we did one we printed over 700 reports and they
24 are out of print now. We have printed 2000 of these work
25 sheets and I would say we have distributed over 1500 of

1 dosb-4 Ellis-direct 413
2 them. So evidently this approach is used.

3 THE COURT: You have 64 dealer members and the
4 64 dealer members have 300 outlets. Isn't that it?

5 THE WITNESS: Yes.

6 THE COURT: I think you said a moment ago that
7 you had 300 dealer members.

8 THE WITNESS: I am sorry, I meant outlets.

9 THE COURT: All right.

10 Q Mr. Ellis, I show you a document which has been
11 marked Defendant's Exhibit A. Do you recognize that?

12 A Yes, that is another table from the census of
13 business in 1967.

14 Q I was asking you about making a survey of dental
15 purchases and you were describing I believe the method that
16 you would use. Let me ask you a question, have you made such
17 analysis?

18 A Yes.

19 Q Well, describe to the Court, if you would, the
20 methods used in your analysis and the data you relied upon?

21 A In 1970 I believe that it was because of a motion
22 for an injunction in this case I prepared quite a detailed
23 affidavit. I can go over this in general terms. I guess
24 that is part of the record and I can describe this in general
25 terms at this time.

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1 desb-5 Ellis-direct 414
2 Q Describe it in general terms to the Court, Mr.
3 Ellis, without getting into the detail of how you divided
4 such a figure by such a figure, and so forth. Just describe
5 in general to the Court the methods used by you.

6 A Essentially first of all I felt that it was
7 impractical to try and analyze this market through use of
8 data from sellers. I can't identify them and I would
9 have no source for data. There is far too many. I felt
10 that the purchase approach was a reasonable one. Perhaps
11 the only way to really go about it.

12 I developed from data from the American Dental
13 Association and the Public Health Service the number of
14 dentists located in the New York and the New Jersey portions
15 of the New York metropolitan area. Using data from the
16 American Dental Association covering the average amount spent
17 by dentists for supplies and the average amount spend by
18 dentists for equipment, I multiplied those averages by the
19 total number of dentists in the New York and New Jersey
20 areas to determine the total expenditures by dentists for
21 supplies and for equipment. Then for the dental laboratory
22 segment of the market I used the sales figures from the census
23 of business in 1967, which listed the total billings of dental
24 laboratories.

25 Information was available from the National

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Association of Dental Laboratories which showed the proportion of the average laboratories gross billings in this broad geographic area that was spent on supplies, on tools or equipment.

I applied these percentages against the total sales tabulations provided by the Bureau of Census.

Now, in the case of the dentists, the survey that I used was by the American Dental Association and it covered the year 1967 and the analysis that was requested of us was for the year 1968, so we extrapolated the data by one year using a percent of increase which is given in the ADA survey.

They cited some historical increases. The laboratory association's data also included some measure of the rate at which laboratory sales had been growing in recent years and we used that figure to extrapolate those data from '67 to '68. We added them together and that provided us with a total market estimate.

This doesn't, by the way, include Federal practitioners.

Q In other words, it doesn't include purchases made by the Government agencies?

A Yes.

Q Is that right, it doesn't include that?

A No.

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1 Q It doesn't include purchases made by dental
2 students?
3

4 A No, because the American Dental Association
5 listing of dentists that I use is a listing of dentists,
6 holders of degrees. So it would be very conservative.

7 Q What is your conclusion as to the total purchases
8 of dental products by dentists and laboratories for the
9 year 1968 through the year 1972?

10 A All right, for 1968 the total was 60.2 million
11 dollars.

12 For 1969, this was an extrapolation from the
13 1968 data, the total was 66.1 million dollars.

14 For 1970, going through the same type of analysis
15 but using a survey of dental practice for that particular
16 year as the basis for my work, the total was 68.5 million.

17 For 1971, the total was 75.2 million.

18 For 1972, the total was 62.6 million.

19 Q For the years '68 and '69 have you made charts
20 or graphs to show these total sales? I show you document
21 marked Exhibit B. Can you state what that is?

22 A Yes, this is a graph I prepared which shows the
23 estimated 1968 purchases of all dental products and of
24 dental equipment. It also shows an extrapolation of the
25 census of business data on dental supply sales in the New

1 desb-8

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2 York metropolitan area in 1967 of all dental products and
3 of dental equipment and it shows the sales that were
4 tabulated by the Government in the data I received. I
5 received these several weeks ago, so I doubt there are any
6 major changes since then, but it wouldn't reflect that.

7 Q That is B?

8 A This is Exhibit B.

9 Q All right. Did you make any chart or graph marked
10 Exhibit C?

11 A I have made several. I don't think you gave me
12 Exhibit C.

13 Q I hand you a document marked Exhibit C. Do you
14 recognize this?

15 A Yes, I prepared that graph also.

16 Q What does that depict?

17 A It is a picture of my estimates of purchases in
18 the New York metropolitan market of all dental products
19 and of dental equipment as contrasted to, again, the Govern-
20 ment tabulation of sales.

21 I would like to point out why I used dental
22 equipment here and not dental supplies. There are some
23 definitional problems. For example, when the American
24 Dental Association goes out to dentists and says what did
25 you spend on supplies not including office supplies, they

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2 answer the questions. The Government tabulated sellers
3 sales according to four classifications. Precious metals,
4 artificial teeth, dental equipment, and sundry merchandise.
5 There is no precisely comparable category to measure against
6 what dentists call supplies, simply to combine all the gold
7 teeth and sundry merchandise wouldn't really be appropriate
8 since laboratories buy most of the gold teeth. Therefore,
9 the most comparable data to compare to in addition to all
10 dental products was simply dental equipment.

11 THE COURT: Mr. Ellis, look at Defendant's Exhibit
12 B for a moment.

13 THE WITNESS: Yes, sir.

14 THE COURT: You have three bars under a heading
15 alled "All products." Does "all products" mean all dental
16 products?

17 THE WITNESS: Yes, your Honor. I am careless.
18 But it is all dental products.

19 THE COURT: All dental products would include
20 dental equipment?

21 THE WITNESS: Yes.

22 THE COURT: Everything?

23 THE WITNESS: Yes.

24 THE COURT: The categories that we have learned,
25 equipment, sundries, artificial teeth, and precious metals?

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2 THE WITNESS: Yes.

3 THE COURT: Now, the bar there on the extreme
4 left, the slashing, I take it, doesn't mean anything?

5 THE WITNESS: No.

6 THE COURT: Just a visual aid. That goes to
7 approximately 60 million dollars, this is in dollars?

8 THE WITNESS: Yes.

9 THE COURT: Now, the next bar is census of busi-
10 ness 1967. Do I understand that that is the base from
11 which you began this exhibit?

12 THE WITNESS: Defendant's Exhibit A, which I
13 was handed earlier, was a census bureau report showing sales
14 of dental supplies and equipment in the New York metropolitan
15 area 1967 at approximately \$55 million. That is represented
16 by the bar with the dots in it. The dashed lines and the
17 bare space shows my extrapolation to 1968.

18 THE COURT: That is the 11 per cent?

19 THE WITNESS: Yes, sir.

20 THE COURT: And the bar at the extreme left with
21 the horizontal slash marks is the result of your extrapola-
22 tion?

23 THE WITNESS: Yes, sir.

24 THE COURT: For 1968?

25 THE WITNESS: Yes.

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2 THE COURT: Now, is this in the metropolitan
3 New York area?

4 THE WITNESS: As it has been defined consistently
5 in this case I don't believe it is.

6 THE COURT: By the Census Bureau or by the Census
7 of Business?

8 THE WITNESS: Yes. That is called -- the technical
9 name for it is the standard consolidated area of New York
10 and Northern New Jersey, I believe.

11 THE COURT: But who puts out the basic data that
12 you use? When you say Census of Business, is that a Depart-
13 ment of Commerce, Census Bureau?

14 THE WITNESS: Yes, sir.

15 THE COURT: Then you got a bar called sales. That
16 is taken from reports of your members?

17 THE WITNESS: Your Honor, those sales data there
18 represent the sales data that were tabulated by the Govern-
19 ment which were given to me.

20 MR. BIANCHI: The plaintiff, your Honor, I
21 think he means.

22 THE COURT: Yes. And that comes from some exhibit
23 that is in evidence?

24 THE WITNESS: Yes, your Honor. I saw them last
25 night.

MR. SIRIGNANO: Your Honor, to the extent that they reflect the sales figures put forth by the Government they are substantially correct, I believe.

THE COURT: All right.

Then the three shorter bars on the right are the same type thing except limited to equipment, dental equipment?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Mr. Ellis, I am going to show you Plaintiff's Exhibit 32 -- do we have 44?

MR. DE MARCO: That is the Government survey of manufacturers.

MR. JINKINSON: We seem to have lost two of our exhibits, your Honor. The doctor was looking at them for a moment.

MR. DE MARCO: Can we go off the record a moment.

THE COURT: Yes.

(Discussion off the record.)

THE COURT: Now we had better go on the record. We were off the record.

MR. JINKINSON: I offer in evidence Defendant's Exhibits A, B and C.

MR. SIRIGNANO: Your Honor, I would like to

1 object to Exhibit A in the form in which it is being presented.
2 I think we have a situation here of what I would consider
3 common fairness. The exhibit as it stands omits a number
4 of pages and the original source material which, for instance,
5 define the terms used in Exhibit A as it stands. It seems
6 to me that either I should be permitted at this time on
7 voir dire to demonstrate that so that the pages of the source
8 from which that was taken are also put in at this time.
9

10 THE COURT: Well, I don't think it makes any
11 difference at which time. I think, Mr. Sirignano, just make
12 that point either on your cross-examination of this witness
13 or at some other time and I will give it full effect.

14 I will overrule the objection. Mark them A, B,
15 C in evidence.

16 (Defendant's Exhibits A, B, and C, respectively,
17 were received in evidence.)

18 Q Mr. Ellis, I am going to show you Plaintiff's
19 Exhibit 31, Plaintiff's Exhibit 44, I am going to show you
20 Plaintiff's Exhibits 32, 33, 34, 35, 36, 37, 38, 39, and 40
21 (handing).

22 A I believe I have 44 here.

23 THE COURT: Do you want this on the record?

24 MR. JINKINSON: Yes.

25 THE COURT: Then what is your comment, Mr. Ellis?

1 THE WITNESS: I believe I have 44 here.

2
3 Q And 42 I show you (handing).

4 Now, based upon your experience and knowledge
5 of this market, the analysis that you have made in connection
6 with this case, do you have an opinion as to whether Plaintiff
7 Exhibit 32, the table before you, accurately reflects the
8 market for dental products sold in the New York area for the
9 year 1968?

10 MR. SIRIGNANO: Objection, your Honor.

11 THE COURT: Well, I think you are probably
12 right, Mr. Sirignano, but I will take it.

13 A No, I believe it understates the market substant-
14 ially.

15 Q You do have an opinion?

16 A Yes.

17 Q What is that opinion, it understates the market
18 substantially?

19 A I believe it understates the market substantially.

20 Q Do you have an opinion for the years 1969 and
21 1970 with reference to the same statement?

22 A These are tables of sales, total sales of dental
23 products --

24 THE COURT: By "these" to what are you referring?

25 THE WITNESS: Exhibits 31, 32, 33 and 34, which cover

1 the years consecutively 1968, 1969 and 1970. And these
2 are tabulations of sales or purported tabulations of sales
3 of the dental market. I believe these, too, understate
4 the market for the years 1968, 1969 and 1970.
5

6 Q What is the basis of your opinion that they
7 do understand the market?

8 A First of all, as a practical matter I don't
9 believe it is possible in the market place as it is in the
10 New York metropolitan area to tabulate all the sellers who
11 make sales in this marketing area. There are manufacturers
12 that I know that make direct sales that are not listed in
13 these exhibits.

14 And while I can't give you a count of the total
15 number of mail order or catalog distributors in the United
16 States that sell in this market, I know -- I notice there are
17 only three here that are listed that are located outside
18 the metropolitan New York area.

19 If indeed there were only three catalog sellers
20 offering products in this market from outside it, then
21 I can't imagine why at program after program dental dealers
22 present papers on services offered by the full service dealers
23 and the difficulty that he faces against this form of com-
24 petition.

25 The Trade Association itself, up until last year,

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1 spent substantial amounts of money on advertising programs
2 promoting the virtues of full service dental supply stores.
3

4 The final reason I think the market is under-
5 stated is I believe these data to be incomplete insofar as
6 setting forth the number of sellers located in this market.
7 We had an exhibit here earlier from the Census of Business,
8 1967 --

9 Q Is that Exhibit A? Without that Exhibit A would
10 it be possible to locate or tell the number of sellers
11 in the metropolitan area market?

12 A If you wanted to determine the number of sellers
13 located in this market at the wholesale level of dental
14 supplies and equipment my answer is yes, there is a way to
15 do it.

16 Q How is that?

17 A Well, one method of -- not their identities but
18 their numbers and volume of sales. One method would be
19 to use this exhibit which is a Census Bureau report --

20 THE COURT: What is the name of it?

21 THE WITNESS: It is called Merchant Wholesalers--

22 THE COURT: What is the number of the exhibit?

23 THE WITNESS: Defendant's Exhibit A.

24 THE COURT: All right.

25 A This is a Census Bureau report which states that

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there were 118 sellers of professional dentalequipment and supplies who were located in the New York metropolitan area in 1967 and did total sales of 54.968 million dollars in that year. Lacking these data one could still obtain the figures by going to the Census Bureau and asking for a very -- to have a special tabulation from a Census of Business run. This is a reasonably common practice. It is available not only to other Government agencies but any private party.

There is a fee for service. Their charges are quite reasonable.

Q Now, look at Plaintiff's Exhibit 31.

A Yes.

Q And look at the first response questionnaire, Paragraph 1. Let me see if I can point it out to you.

Paragraph 1 (indicating).

Now, let me askyou this question. Does the ADTA define dental equipment?

A Yes.

Q For what purpose do you use that definition?

A To insure comparability of reporting by dental dealers on the reports that are submitted to the Trade Association.

Q How was the definition of that term arrived at?

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2 A It was probably the least desirable definition.
3 For some years -- there is an industry committee called the
4 Analysis Committee that has tried to sharpen up the
5 definition of dental equipment. What they would very much
6 like to do is delineate precisely those products that are
7 contained in this category.

8 When we were moving toward the revision of this manual
9 of accounting in 1967 the Analysis Committee asked me to
10 make a survey of the larger chains of dental supply stores
11 in the country to ask them what their classification was
12 for dental equipment, what products specifically were
13 included. No two companies listed was alike. There
14 was no reasonable compromise basis on which we could say,
15 all right, dental chairs, dental units, et cetera, et cetera,
16 are included in our dental equipment. So the committee
17 compromised on a dollar volume definition and it reads,
18 "New and used equipment in used all non-consumable dental
19 items having a retail value greater than \$100 or requiring
20 the use of equipment personnel for shipping, warehousing
21 or installation. All used items originally classified as
22 equipment are included regardless of retail value."

23 It was a compromise.

24 Q In other words, I take it then, that the term
25 "equipment" does not -- did not have a common meaning among

1 dental product sellers?

2
3 MR. SIRIGNANO: Objection to this kind of leading.

4 THE COURT: I will allow it.

5 Overruled.

6 A Well, I think within the members of the Trade
7 Association it would be well-established, the manual of
8 accounting was first published in 1921.

9 Q The non-members of the ADTA, do they generally
10 have access to the ADTA definitions?

11 A No, not generally.

12 Q Are you familiar with the manner in which dental
13 product sellers keep their books and records?

14 A Yes.

15 Q Directing your attention to the questionnaire
16 appearing -- the question appearing in the questionnaire
17 in Plaintiff's Exhibit 31. I direct you to Paragraphs 2, 3,
18 4, and 5. Do you think that dental products dealers could
19 keep those records?

20 MR. SIRIGNANO: Objection, your Honor. I don't
21 think there is any foundation for answering this question.

22 A Well, I am not an attorney and perhaps I don't
23 understand the significance of what I offered, but we did
24 design in 1969 a series of computer programs. For a small
25 association it was an extremely expensive undertaking and now

1 we sell a very large and complete package of computer
2 software which are available to dealer members of the
3 association. These supplant in many instances certain books
4 and records that they would have maintained by hand. I
5 teach the course on how to install this system in their stores.
6 So I do have some knowledge.
7

8 I am not an accountant and I don't profess exper-
9 tise in that area, but I had to become more than average in
10 proficiency to determine what they were doing.

11 Looking at the exhibit, Question 2 is, (1) to
12 determine total company sales from a company of the above
13 listed products for three years, 1968, 1969 and 1970," would
14 assume that virtually every company could report its total
15 sales.

16 Question 3 asks company sales to each of the
17 following classes of customer, broken down by year for 1968,
18 1969 and 1970, and specifically details dentists, dental
19 laboratories, institutions and Government agencies.

20 In my opinion few dealers, particularly back
21 in 1968, had an information retrieval system that would
22 enable them easily, without a great deal of effort, to
23 develop data of this kind. This is marketing data. It is
24 true, our computer package has a report that is prepared
25 called a customer marketing analysis, which will generate these

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1 kinds of data, but there is no one now in the New York metro-
2 politan area using it currently.
3

4 And in 1968 this was a fairly sophisticated
5 question. Unless the company wanted to go back and code
6 all of their invoices by customer type and resort them and
7 tabulate them by that basis, I think the question is an
8 invitation to guess or to estimate the breakdown.

9 Question 4 asks for company sales by geographic
10 area in 1968, 1969, and 1970, and sets forth the five boroughs
11 of New York City, Rockland and Westchester Counties, Nassau
12 and Suffolk Counties, and then the counties in New Jersey
13 are in the next part of the question. Most dental supply
14 stores that have outside salesmen would naturally keep their
15 sales data broken down by sales territories so they can
16 commission the salesman.

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It has been my experience that rarely are sales territories delineated on the same lines as counties are. We had a situation down in Atlanta, Georgia, where we installed our computer system, and we found that not only did the salesmen's territories cross county lines, they crossed five different states, and they had to make a revision in the program to generate tax data for that many jurisdictions.

I doubt that in 1968, 1969 and 1970 very many dealers had reasonable access to data of that kind.

Q Does that complete your answer?

A Yes.

Q Let me ask you this question: Would the percentage ratios between the classes of products in question, number one, in your survey, have been constant from 1968 through 1969?

A These are essentially the product mixes of four categories. No.

Q Why would they be different?

A Because in 1970 as the stock market turned down, fewer and fewer dentists were making a capital investment in equipment, and sales of dealer equipment did not rise at the same rate as the other commodity classes. Therefore, you would have a shift in the percentage

1 nmsg 2

Ellis-direct

2 distribution of your product mix.

3 THE COURT: I think we will have to stop here.

4 MR. JINKINSON: Yes. It's a good breaking point.
5 I am going to change to another subject.

6 THE COURT: Tell me, do we have everything
7 from both sides that the Court will need to decide the
8 question about the admissibility of the government's surveys?

9 MR. JINKINSON: No. We are working industriously,
10 and we should have very shortly an analysis of the
11 original documents which we kept, as the Court knows,
12 for a couple of days. I don't think Mr. DeMarco has done
13 them yet. He is working, and I think very shortly we
14 will have for the Court the benefit of whatever it is
15 going to be, a critique on the exhibit itself.

16 THE COURT: You briefed the point, of course, in
17 your trial memorandum.

18 MR. JINKINSON: We are not going to repeat that,
19 your Honor.

20 THE COURT: Do we have everything from the
21 government?

22 MR. SIRIGNANO: I think so. I am
23 beginning to wonder. We have no idea of what the defendant
24 has in mind in terms of this so-called critique, except
25 it has something to do with differences between the

* * * *

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DAVID ALLEN ELLIS, resumed:

THE CLERK: Mr. Ellis, you are still under oath.

DIRECT EXAMINATION (Continued)

BY MR. JINKINSON:

Q I hand you Exhibits marked Plaintiff's Exhibits 31 and 31-A. I think you have seen these before. I ask you this question:

In examining Plaintiff's Exhibits 31 and 31-A from the viewpoint of the statistician, do you consider this questionnaire to have been carefully designed? Just answer that yes or no.

A No.

Q Why?

A Well, I testified earlier that I felt that it would be very difficult for the majority of dealers to report some of the breakdowns that are requested in this questionnaire. I have not seen, in looking over the material, a sheet of definitions of terms. This is a normal practice in survey work to assure that you will get comparability of data.

There are occasions when for a visual effect you might wish a questionnaire to appear short or small or brief. If that is the case, then I feel it is incumbent that you pre-test the questionnaire on the same universe to which it will be mailed, thus assuring yourself that the terms are

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1 MMP 2 Ellis - direct
2 completely understood by the respondents in the survey. We
3 do this; I think the former practice of sending a sheet
4 of definitions is the more common.

5 THE COURT: Mr. Ellis, what is the meaning of this
6 word, which I take it is a word of art that is used:
7 "universe"?

8 THE WITNESS: This is the group of the set of
9 individuals, firms, that defines -- that is defined by the --
10 Can I start over again?

11 Basically, you know the type of information you
12 want to gather. You define the universe by saying these are
13 the people we want to survey. The universe denotes all the
14 individuals or companies or whatever that fit those criteria.
15 For example, if we were doing a survey to determine the
16 average wages of carpenters, our universe would be all car-
17 penters within what geographic area we define.

18 THE COURT: So if we want to survey all dental
19 dealers in the City of New York, the universe would be all
20 dental dealers in the City of New York?

21 THE WITNESS: Yes, and we would presumably define
22 it in some way so that it would be readily understandable.

23 THE COURT: Well, isn't my definition readily
24 understandable?

25 THE WITNESS: Well, there is doubt as to what a
dental dealer is. You would define even the elements of

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1 MMP 3 Ellis - direct
2 the universe. Once you have done that, that really specifies
3 the universe.

4 THE COURT: "Universe" is, therefore, a shorthand
5 term to avoid having to use all dental dealers, as defined
6 in the City of New York?

7 THE WITNESS: Yes.

8 Q Do you know whether or not the survey, Plaintiff's
9 Exhibit 31, was pre-tested for ambiguity?

10 MR. SIRIGNANO: Objection. There is no conceivable
11 way in which a witness can answer that question with any
12 knowledge.

13 THE COURT: Read the question, please.

14 (Question read.)

15 THE COURT: Well, I don't see how he would know,
16 but I will let him answer.

17 A I cannot tell from looking at the questionnaires.

18 Q Can you give an example of a pre-test for ambiguity?

19 MR. SIRIGNANO: Objection, your Honor.

20 THE COURT: No; I will permit it.

21 I might agree with all of your objections, Mr.
22 Sirignano, but I think we will probably, in the long run,
23 get along better if we make the record.

24 He has answered he does not know whether your
25 survey was pre-tested for ambiguities or not. Now I suppose

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1 MMP 4 Ellis - direct

2 you want him to tell us how can such a thing be done.

3 MR. JINKINSON: That is right.

4 THE COURT: If you can, answer that.

5 A Well, perhaps I can answer it by this illustration:
6 Ten years ago, in 1963, we were undertaking a mail survey
7 of dentists, and there were a number of questions on the
8 questionnaire that related to product areas. These products,
9 however, were not described by brand names but in general
10 terms, and we had some trepidation that the respondents in
11 the survey might not know what, for example, a silicon im-
12 pression material or a mercaptan rubber impression material
13 was.

14 These are very technical terms. We were not even
15 sure that a dentist would know for certain what they were.
16 So we decided to do some personal interviews using a draft
17 of the questionnaire.

18 One episode that comes to mind is a dentist that
19 I interviewed in Washington. The technique was to give them
20 a copy of the questionnaire, tell them only that we wanted
21 them to complete it as best they could and to ask any ques-
22 tions of us if they had difficulty in answering the question-
23 naire.

24 One dentist told me that he would feel more com-
25 fortable if I sat in the dental chair and he stood up beside

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MMP 5

Ellis - direct

me. when he filled the questionnaire out, and he put the questionnaire up on the bracket on the table, and he laid his arm against the dental unit when he was writing.

He had not been writing on the questionnaire a few seconds and was on the first question, dealing with dental equipment. The question was, "Did you purchase any of the following items during the last year, and do you intend to purchase any during the coming year?" And then it listed a number of dental equipment items. He stopped as he was putting check marks in the boxes, and I said, "Is there something wrong, Doctor?" And remember, he is leaning with his arm against the unit, and he said, "What's a dental unit?"

Now, we had assumed that everyone knew what a dental unit was. There was no doubt in our minds. And clearly, here is an ambiguous area that we had not even suspected. We thought the problems would come in other areas.

So these crop up in areas where you least expect them.

THE COURT: So what you are saying is, it is a good idea to take a proposed questionnaire and try it out on a sampling of the group to be surveyed?

THE WITNESS: I believe so.

THE COURT: Go over it with them and, in effect, see whether they can understand it or not, and in this

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1 MMP 6 Ellis - direct

2 instance you found that he could not, so you tried to change
3 it?

4 THE WITNESS: That is correct.

5 THE COURT: All right. I get it.

6 MR. JINKINSON: Mr. Meyer Cyker, the next witness,
7 president of the Health Company, is in the courtroom.

8 THE COURT: Mr. Sirignano said he would not object
9 to it.

10 MR. SIRIGNANO: I would object. If our witnesses
11 are to be sequestered, I don't see why he should be here.

12 THE COURT: We will excuse him.

13 MR. JINKINSON: He is a representative of the
14 corporation, and that is an exception to the rule.

15 Do you agree, Mr. Sirignano?

16 MR. SIRIGNANO: Mr. Jinkinson, you raised the
17 question of sequestering the witnesses at first.

18 MR. JINKINSON: I understand that, but my impres-
19 sion, from many years of practice, is that there is one
20 exception to invoking the rule, and that is that the defendant
21 is entitled to have a representative present at all times.
22 We have not had one present. Mr. Siker is president of the
23 corporation, and he has a right to be in court.

24 That is my position.

25 THE COURT: I will permit one representative. He

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1 MMP 7 Ellis - direct

2 is the president of the corporation?

3 MR. JINKINSON: That is right.

4 THE COURT: Then the president of the corporation
5 may be present, but we will exclude all other witnesses.

6 Do you understand our ground rules?

7 Q Now, Mr. Ellis, do you notice any statistical bias
8 in the survey identified as Plaintiff's Exhibits 31 and 31-A?

9 A There are many forms of bias that you can encounter
10 in survey work. Frankly, most of them wouldnot be detectable
11 by looking at a questionnaire that is being completed, and
12 in many instances even the person or the group that have
13 done a survey cannot detect this until some time later, when
14 they survey the same universe and find out the answers are not
15 the same.

16 There is a small element that I would like to point
17 out in these questionnaires that is sometimes referred to
18 as the 5's and 10's bias.

19 THE COURT: What are the questionnaires to which
20 we are referring now?

21 THE WITNESS: This is Plaintiff's Exhibits 31 and
22 31-A, your Honor.

23 THE COURT: 31 and 31-A. All right.

24 THE WITNESS: Many of the responses to the questions
25 that asked for breakdowns by customer class and so on have

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been rounded off in some instances to the nearest ten dollars, to the nearest hundred dollars, to the nearest thousand dollars and in some cases to even greater amounts.

This frequently indicates that the respondent has not taken the answer to the question from books or records but that he is indeed estimating the answer.

Now, I cannot give you a value judgment for his estimate, whether it would be high or low, or good or bad, but it is evident in many, many instances here in these questions that require a breakdown of the sales figures that the 5's and 10's bias is present.

Q Mr. Ellis, I am going to hand you three documents that have been marked Defendant's Exhibit F, Defendant's Exhibit G and Defendant's Exhibit H.

MR. JINKINSON: I would like to have them marked for identification.

THE CLERK: They have been marked for identification.

THE COURT: Remember, anything that you want in the record you have to say loud enough for the reporter to hear and slowly enough for the reporter to get.

Q (Continuing) I will take them seriatim. Can you state what Defendant's Exhibit F is?

A Defendant's Exhibit F is a table from the 1967

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census of business with particular reference to wholesale trade, and it shows the sales of various commodity lines by merchant wholesalers in the United States in 1967.

Q Is it a record from the publication of the Census Bureau?

A Yes; it is.

Q Will you look at Defendant's Exhibit G, please, and tell me what that is?

A This is another table from the 1967 census of business. It is from the same publication, and it again refers to commodity line sales by merchant wholesalers.

On this table the sales are broken down into broad groupings by type of business.

Q Will you look at Defendant's Exhibit ^H and identify that if you can, sir?

A This is a page taken from the 1967 Standard Industrial Classification Manual, published by the Bureau of the Budget, and it is from the section on wholesale trades, because the industry numbers start with the digits 50.

MR. JINKINSON: The defendant offers in evidence Defendant's Exhibits F, G and H.

MR. SIRIGNANO: No objection.

(Defendant's Exhibits F, G and H for identification were received in evidence.)

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2 Q In addition to Defendant's Exhibits F, G and H
3 and Plaintiff's Exhibit 20 and Defendant's Exhibits A and
4 B -- Those have previously been offered and admitted in
5 evidence. I am going to ask you some questions about them.

6 Now, calling your attention to the data indicated
7 by the underlining in Exhibit F, will you please tell the
8 Court what these data indicate?

9 A This is a table that covered sales in '67 by
10 merchant wholesalers in the United States, and it is a summary
11 of sales of various commodity lines.

12 THE COURT: "This" refers to what?

13 THE WITNESS: Defendant's Exhibit F, your Honor.

14 A (Continuing) It shows that in 1967 the Census Bureau
15 determined that 702 establishments in the United States
16 sold dental equipment and supplies, and the total sales of
17 dental equipment and supplies by these establishments was
18 \$315.85 million.

19 Q Now, calling your attention --

20 THE COURT: I take it that would be \$315,850,000?

21 THE WITNESS: Yes, sir.

22 Q Calling your attention now to Defendant's Exhibit
23 G, directing your attention to the bracket in the last column.
24 Will you please describe these data for the Court?

25 A This is Defendant's Exhibit G. It shows a break-

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Q Now, is there a correlation between Defendant's Exhibits F and G?

A Yes, there is.

Q What is that?

A It shows that all the sales of dental supplies and equipment done in the United States in 1967 were done by professional equipment and supply distributors.

Q Now, I call your attention to Defendant's Exhibit --

A Excuse me. May I elaborate on that?

The numbers are the same. In one instance we had 702 establishments in both tables, even though one is a subdivision of the other, and the dollar figures are precisely the same.

THE COURT: What is the difference between merchant wholesalers selling dental equipment and supplies and professional whatever the rest of it is?

THE WITNESS: Well, merchant wholesalers is a much broader group. It might include any form of wholesale business, and when the census bureau asks them what sorts of commodities they sell, conceivably a wide variety of firms might reply that they sold dental equipment and supplies, but in this case they were only sold by professional equipment and supply distributors.

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1 jgmch 2

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2 THE COURT: Oh. You mean that a wholesale grocer
3 might also sell dental equipment and supplies theoretically,
4 but as it turned out all of the persons selling dental
5 equipment and supplies sold only dental equipment and
6 supplies and nothing else?

7 THE WITNESS: Not quite, your HONOR.

8 THE COURT: I must say it is somewhat confusing.

9 THE WITNESS: There are perhaps a variety of
10 sources from which one could obtain dental equipment and
11 supplies. We know, though, from this table that all of
12 these supplies were sold by companies classified as
13 professional equipment and suppliers. Therefore, they
14 didn't come from wholesale liquor stores or wholesale
15 drug stores or anything like that.

16 Now, the group of professional equipment and
17 suppliers is much narrower than all merchant wholesalers.

18 THE COURT: But it is much narrower, perhaps,
19 in some lines, but in this line, dental equipment and
20 supplies, it is the same thing.

21 THE WITNESS: It happens that all the sales in
22 the United States of dental equipment and supplies were
23 done by companies who are classified as professional equip-
24 ment and supply distributors.

25 THE COURT: And they are so classified because
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1 jgmch 3 Ellis-direct
2 they don't sell anything else.

3 THE WITNESS: Anything other than professional
4 equipment and supplies.

5 THE COURT: Yes. All right.

6 Q Now calling your attention to Defendant's
7 Exhibit H, will you describe that exhibit to the Court?

8 A This is a table from the Standard Industrial
9 Classification Manual, and it is one taken from the whole-
10 saler. As I said before, because the first two digits
11 of the industry classes are all 50, which are the wholesale
12 trade classification numbers.

13 Q Have you completed your answer, Mr. Ellis?

14 A Yes.

15 Q Now I will ask you to look at Plaintiff's
16 Exhibit 20. Will you please describe to the Court the
17 data indicated by the underlining on Plaintiff's Exhibit 20?

18 A This table is another table from the 1967 census
19 of business. This time this particular table shows sales
20 done by companies that are classified specifically in
21 certain industries, and the particular figure that is
22 underlined indicates that merchant wholesalers classified
23 as dental supply stores were 655 in number and their
24 total sales were \$314,757,000 in 1967.

25 Q So there is a relationship between Plaintiff's

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Exhibit 20 and Defendant's Exhibit G; is that right?

A Yes, because Defendant's Exhibit G showed that 702 professional equipment and supply distributors had sales of \$315,850,000 while Plaintiff's Exhibit 20 shows that there were 655 of these 702 companies that were classified as dental supply stores and their sales were \$314,757,000.

What this indicates is that the amount of dental supplies and equipment sold by companies that are not dental dealers are virtually insignificant on a national level. Although there are 47 professional equipment and supply distributors that sell the commodity line, their total sales are only a million dollars in 1967.

THE COURT: Would you assume that they are probably surgical or medical equipment and supply houses?

THE WITNESS: I think that would be a very reasonable assumption, your Honor, because the description from the Standard Industrial Classification Manual of professional equipment and supply distributors reads, "Establishments primarily engaged in the wholesale distribution of mechanical devices and other equipment used by architects, dentists, engineers, physicians, surgeons, veterinarians, optometrists, osteopaths and other professional groups." And I think surgical supplies

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would be the most likely assumption.

But, once again, the sales of distributors other than dental supply houses nationally amounted to only \$1,000,000 out of approximately \$315,000,000.

Q Now, I call your attention to Defendant's Exhibit A, with particular attention to the data indicated by the bracket on that exhibit, that is, Defendant's Exhibit A, will you describe for the Court what these data indicate?

A Defendant's Exhibit A is another table from the 1967 census of business. This is a breakdown of the national commodity line sales by merchant wholesalers, which shows only sales in the New York-Northeastern New Jersey metropolitan area. The data in the bracket indicate that there were 118 establishments selling dental equipment and supplies and their total sales in 1967 was approximately \$55,000,000.

Q Will you summarize for the Court the analysis you have just given regarding all the defendant's and plaintiff's exhibits that contain data from the 1967 census of business?

A Well, I testified earlier to the fact that the sales of dental supplies and equipment on a nationwide level done by companies other than dental supply stores

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2 were insignificant, approximately a third of 1 per cent
3 of the total.

4 Therefore, it is my conclusion that the
5 \$55,000,000 in sales shown for the New York metropolitan
6 area must have been done almost in their entirety by dental
7 supply stores.

8 Further, while the number of 118 establishments
9 that reported these sales may, and probably did, contain
10 some surgical or other form of professional equipment
11 and supply distributor, the probability is that the sales
12 by these companies were insignificant compared to the
13 dental supply stores.

14 Q I hand you Plaintiff's Exhibit 32. Will you
15 examine it, please, and tell the Court how many firms
16 located in New York, the New York metropolitan area, are
17 listed thereon?

18 A There are a total of 64 firms on the table
19 and 4 are parenthetically indicated by a footnote that they
20 are mail order houses located outside the metropolitan
21 New York area. So that would be 60 firms are on this
22 list.

23 Q Approximately how great were the total sales
24 volume in 1968 of the dental dealers located in the New
25 York City metropolitan area as shown on Plaintiff's

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2 Exhibit 42?

3 A Just the sales volumes of the stores located in
4 the area?

5 Q Yes.

6 A Well, the total on the table of all 64 companies
7 is 31.3 million dollars and the other 4 firms that were
8 outside the area had sales of approximately \$177,000.
9 So that would leave a total inside the area of about 31.1
10 or .2 million dollars in 1968.

11 Q Now, the census bureau data indicated by the
12 various exhibits you have referred to here indicate
13 dental product sales of about \$55,000,000 in 1967.

14 A That's correct.

15 Q And the plaintiff's survey shows approximately
16 31 million, is that right?

17 A Yes.

18 Q Have you estimated the extent to which the sales
19 indicated in the census bureau report could have increased
20 or decreased from 1967 to 1968?

21 A Yes, I have.

22 Q What is your estimate?

23 A We estimated approximately 11 per cent, or about
24 \$5,000,000. This would increase the total from about
25 \$55,000,000 to about \$60,000,000.

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2 Q Can you explain why the total sales from Plaintiff's
3 survey for 1968, being Plaintiff's Exhibit 32, and the
4 census bureau data for metropolitan New York City differ
5 so markedly?

6 A No, I can't explain it. The only conclusion
7 I've been able to conceive is that there was an under-
8 coverage in the initial survey, that the questionnaires
9 weren't sent to enough firms.

10 Q Well, let me ask you this question: Could the
11 difference, the numbers of firms tabulated by the census
12 bureau in Defendant's Exhibit A and the plaintiff's
13 survey, be explained by the fact that the census bureau
14 counts outlets or establishments while the plaintiff's
15 data listed companies, some of which had more than one
16 branch location?

17 A No, because if the plaintiff's survey had covered
18 all the branch outlets and then tabulated only the parent
19 company totals, then their dollar volume would have been
20 somewhere in the neighborhood of \$60,000,000, if that
21 were the case.

22 Q Are you familiar with the method used by the
23 census bureau to obtain the names of firms and classify
24 them according to their types of business?

25 A Generally, yes.

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Q What is that? How is it done?

A Well, they place very heavy reliance on the use of social security administration employer numbers. Every private employer in the country that has at least one employee has a reporting number and they attempt to classify all the employers in a given area, and in fact in the whole country, according to their type of business. This tells them which questionnaires to send to which establishments. They don't send a grain terminal questionnaire to a dental supply dealer, for example.

Q Do you consider the data collected by the census bureau in the census of business generally reliable?

A Yes.

Q Do you consider the census bureau data on dental product sales in the New York metropolitan area together with an estimated increase of 1967 to be an accurate portrayal of the market for dental products in that area in 1968?

A Well, I would like very much to say yes because it is coincidental that the total of \$60,000,000 which we have estimated for 1968 comes out approximately the same as the independent analysis I prepared three or four years ago. But the problem with using the census data in this situation is that they make no -- there is

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1 no attempt made for adjustment of shipments going out
2 of the New York area to customers located outside it,
3 nor is there an attempt to show sales in the area by
4 companies located outside the area.
5

6 And also, in fact, in this market, because these
7 are wholesale trade data, there is no indication of sales
8 by direct manufacturers. So for that reason I don't think
9 the census bureau data accurately portrays the market as
10 it was in 1968, either.

11 THE COURT: Tell me, does the census bureau
12 use a New York metropolitan area?

13 THE WITNESS: Yes, your Honor.

14 THE COURT: And has the plaintiff used the
15 same New York metropolitan area as the census bureau?

16 Mr. Sirignano can tell me that.

17 MR. SIRIGNANO: The particular so-called New
18 York-Northeastern New Jersey consolidated area, which is
19 the subject matter of the testimony, is identical to
20 what the plaintiff has characterized as the metropolitan
21 New York area.

22 THE COURT: So the figures should be comparable?

23 MR. SIRIGNANO: No, your Honor. That does not
24 follow. But the geographic areas are exactly comparable.

25 THE COURT: All right. We will get to that

1 later. I just want to understand it. It isn't because
2 of any difference in geog phy?

3 MR. SIRIGNANO: No, your Honor.

4 THE COURT: All right. I understand.

5 Q Now, Mr. Ellis, will you look at Defendant's
6 Exhibit B? Do you have it there?

7 A Yes.

8 Q Is that the bar chart?

9 A Yes, it is.

10 Q Has it been offered and received in evidence?

11 Let me look at it and see.

12 Yes, it has been .

13 I just want to ask you one question about that.
14 Will you tell the Court why you placed the census bureau
15 bar on the graph if it was not representative of the
16 1968 market figures?

17 A Well, we have a situation here where I prepared
18 a market analysis based on dentists' purchases. The
19 plaintiff has done a survey in which firms were listed
20 and surveyed -- that is, by mail. So you have two different
21 bases for examining a market.

22 It seems to me that the plaintiff's survey and
23 the census bureau canvass are done on the same basis.
24 That is, an attempt is made to enumerate the sellers
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1 located in this geographic area and then to determine
2 their sales and total them.
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4 So I put the census bureau data together with
5 an extrapolation for 1968 on the graph because I felt
6 it represented a reliable and reasonable standard against
7 which the plaintiff's survey might be compared.

8 Q Well, does the bar labeled "purchasers" on
9 Defendant's Exhibit B represent an accurate market portrayal,
10 in your opinion?

11 A Well, of course, I prepared the analysis that
12 resulted in that bar -- the total that that bar represents.
13 But I've also testified that I felt the date which I
14 prepared understated the market somewhat because I was
15 unable to include dentists in the Federal service con-
16 sumption in this area, nor could I estimate the purchases
17 by dental students that have not yet received their
18 degrees.

19 Q Now, one final question, Mr. Ellis. You have
20 testified earlier that customers for dental products have
21 become more price conscious and you have testified that
22 mail order companies have increased their share of the
23 market.

24 Do you have an opinion as to what these trends
25 will be in the future?

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jgmch

Ellis-direct

470

A Yes.

Q What is that opinion?

A I prepared several analyses which contrasted purchases or expenditures by dentists for supplies against sales by dental dealers.

Q Let me interrupt you there, Mr. Ellis, and hand you three documents which have been marked Exhibit D, Exhibit J and Exhibit K.

Now, my question is, can you recognize Exhibits D, J and K?

A Yes. These are three graphs.

Q Did you prepare them?

A Which I prepared, yes.

MR. SIRIGNANO: Your Honor, since I just saw these this morning, I would like to ask right now when these were prepared. Defendants were supposed to supply all their exhibits in their direct case to us well before any particular witness. We saw these for the first time this morning and I would like to find out exactly when they were prepared.

THE COURT: Well, I'll give you all the time you need, if you need any, as far as these graphs are concerned. I don't think we need to stop for that, Mr. Sirignano, because you can have any amount of time that is

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reasonable to make answer to them.

Q Will you explain Exhibits D, J and K?

A Well, I would like to start with Exhibit J.

The American Dental Association does a survey of dental practice every three years. In this survey they indicate their estimate of the total national dental bill. These would be the total fees collected by dentists in the United States. I took their estimates of the total national dental bill for 1961, 1964, 1967 and 1970 and applied to each of these the percentage that the average dentist spent on supplies as determined by the American Dental Association surveys.

Now, that percentage is very interesting to me because this, of course, is one of the basic tools that we use in estimating the total market for the industry. But, more than that, there is a consistency about it which I think bears note.

In the 1961 survey, the American Dental Association reported that dentists spent 5.7 of their incomes for supplies. In the 1964 survey, dentists spent 5.8 per cent of their income for supplies. In the 1967 survey, dentists spent 5.8 per cent of their incomes for supplies. In the 1970 survey, dentists spent 5.6 per cent of their incomes for supplies.

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Ellis-direct

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I think clearly there is a consistency here.

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1 jckl
2 Q You are referring to which chart? Or is it just
3 a general observation?

4 A I am talking about what I used, the underlying
5 data to prepare Chart J.

6 Q All right. Proceed.

7 THE COURT: Did you make the percentage spent
8 by dentists in 1961 a base of a hundred?

9 THE WITNESS: Yes, I did, your Honor.

10 THE COURT: And then by 1970 it is 5.8 percent?

11 THE WITNESS: Could I try to explain it in my
12 own words?

13 Q Yes.

14 A The American Dental Association provided their
15 estimate of the total fees collected by dentists and also
16 an estimate of the percentage which dentists spent for
17 supplies. I applied these percentages to the total to
18 determine the amount in dollars that they spent for supplies
19 for the years 1961 --

20 THE COURT: I see. You worked with dollars, not
21 percentages.

22 THE WITNESS: I started with dollars, applied a
23 percentage to it, and got other dollars.

24 THE COURT: Yes.

25 THE WITNESS: Then, in order to make the comparison

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shown on this chart, which is against dealers' sales --

Q On which chart?

THE COURT: J.

A Exhibit J -- I converted dentists' purchase figures to an index with the average 1961 equal to a hundred.

Now, the American Dental Trade Association publishes an index of dental dealers' sales. Over the period shown on the chart from 1961 to 1972 we have had several bases in our index, but I rebased the indexes so they would all be on a comparable level.

That is, 1961 equals a hundred. And I plotted our indexes of dealers' sales against the indexes of dentists' purchases.

Now, the dotted line on the chart from 1970 on indicates an extrapolation made by me to estimate the trend of dentists' purchases since the American Dental Association did their 1970 survey.

THE COURT: Because they did not do a comparable survey in '71 or '72.

THE WITNESS: That's correct.

THE COURT: I understand.

THE WITNESS: My basis for that extrapolation is the growth rate of their purchases from the prior two surveys, from 1967 to 1970. I felt this was a reasonable basis

1 for extrapolation because I found in the process of my
2 study that indeed, between each study, dentists' expenditures
3 have accelerated. So I felt this would be reasonably
4 conservative and a fairly accurate way to do it.
5

6 At least it would not tend to overstate it by
7 any large measure.

8 THE COURT: And the growth shown in dollar volume
9 is attributable to population increase and dollar inflation
10 or price inflation.

11 THE WITNESS: Yes.

12 THE COURT: Largely. There may be some other
13 factors, too.

14 THE WITNESS: Yes. Possibly more utilization of
15 dental services by the public. A variety of reasons would
16 cause this.

17 But these are purchases, and the fact that the
18 two trend lines diverge --

19 THE COURT: Shows that even the dentists are buying
20 from somebody other than dealers.

21 THE WITNESS: I believe that is the most reasonable
22 conclusion, yes.

23 THE COURT: At any rate, that's what you think
24 this chart shows?

25 THE WITNESS: Yes, I do.

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1 THE COURT: And your association makes actual sales
2 trend reports through 1972.

3 THE WITNESS: Yes, sir.

4 THE COURT: So there is no extrapolation on the
5 dealers' sales?

6 THE WITNESS: No. I did have to rebase the indexes,
7 which is a fairly standard statistical technique, to make
8 them all comparable.

9 I would like to talk now about Chart K, or Defend-
10 ant's Exhibit K, which summarizes the preceding graph.

11 This shows simply that from 1961 through 1972,
12 in my judgment dentists' purchases of supplies rose 137.5
13 percent while dealers' sales rose 87.1 percent. That's
14 just a summary.

15 THE COURT: And it is not really a question of
16 judgment. If you assume that Exhibit J is accurate, then
17 this is simple mathematics, isn't it?

18 THE WITNESS: Yes, sir.

19 THE COURT: That is, Exhibit K is simple mathematics.
20 All right.

21 THE WITNESS: The third exhibit, Defendant's Exhibit
22 D, I prepared from data prepared by me to estimate the New
23 York metropolitan area market and data taken from the inter-
24 rogatories in this case concerning the Healthco Corporation's
25

427a

1 sales figures and just plotted the percentage increases
2 in my estimated market figures versus the companies' reported
3 sales figures.
4

5 I would like to comment on this whole area, if I
6 may. We see a divergent trend here of dentists' purchases
7 and dealers' sales, and I have not heard anyone else
8 testify, but I am certain that every dental supply operator
9 who was asked would have replied that mail orders represented
10 a large source of competition to him in this market.

11 I think most people in the industry will accept
12 this fact, certainly.

13 MR. SIRIGNANO: Your Honor, I move that the last
14 answer be stricken. It was not a reply to any question
15 given.

16 MR. JINKINSON: I beg to differ iwth you.

17 MR. SIRIGNANO: The statement of opinion as to
18 what some other dealers would have said about a large amount
19 of competition was responsive to any question that you
20 previously asked?

21 MR. JINKINSON: I asked him if he had an opinion
22 on what the future trends of the dental market will be.

23 THE COURT: Let's don't argue about it. All of
24 your points, however good they are, Mr. Sirignano, I am going
25 to take into account in determining what the weight to give

1 this, and if his answer is too speculative then I won't
2 give it any weight.
3

4 MR. SIRIGNANO: Your Honor, at this time I would
5 like to put on the record, and perhaps spell out slightly,
6 every bit of testimony -- I shouldn't say every bit. But
7 the last exhibits which have been put forth all come down
8 again to surveys which have never been introduced into
9 evidence, which the plaintiff has never had an opportunity
10 to test by cross examination, which this witness had nothing
11 to do with.

12 And yet with all the attack on the survey intro-
13 duced by the plaintiff, with all the formality which a sur-
14 vey should be properly conducted, with the defendant having
15 been igven an opportunity to see all underlying testimony,
16 the defendant proceeds to put in all these exhibits based
17 on surveys which are not in evidence and to get these sur-
18 vyes into evidence by this back door and with this witness
19 continuing to testify on extrapolations based on premises
20 which are not presently in evidence, and in no way have any
21 steps been taken to place in evidence.

22 THE COURT: Yes. But we have worked out a pro-
23 cedure for dealing with it and we are going to deal with it
24 on your motion to strike. But I will give them a chance
25 to make the record. On all of these matters, if these continue

1 to remain in evidence, these questions and answers will be
2 measured against your objections to see what the weight, if
3 any, I ought to give it.
4

5 MR. SIRIGNANO: Thank you.

6 THE COURT: All right. Let's go on.

7 A Well, I believe that possibly the consideration
8 only of mail order sales as the reason for divergence
9 between dentists' purchases and dealers' sales may be only
10 the tip of the iceberg.

11 This may even be a presently outward or visible
12 sign of a market upheaval that could take place in the next
13 five to ten years in this industry.

14 I would like to point out just a few things.
15 Back in the middle 1960's the Stanford Research Institute
16 long-range planning division wrote a report on the dental
17 industry and predicted the demise of the dental dealers as
18 we know them today by 1985. And I can remember laughing
19 at that report because we felt the people who wrote it had
20 been heavily biased in talking to certain individuals in the
21 industry who felt this way.

22 Now, I'm not so sure. From the dealer's point of
23 view there may very well be another specter on the horizon.
24 the possibility that direct sales by manufacturers may ac-
25 celerate, and for the following reasons:

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In this session of the Congress the Senate has already passed a bill which would provide approximately eight hundred million dollars for the formation of Health Maintenance Organization. The House has passed a bill which would provide approximate two hundred million dollars for this purpose.

The bill will go to the conferees and presumably there will be some compromise worked out.

Health Maintenance Organization represents a private group of professional people established to provide or deliver medical care and/or dental care to some designated group of the public. They may be indigents, such as come under the Medicaid provisions, they may be union members whose employer provides them with dental care as part of a fringe benefit package, or they may fall into an elderly group or some other group that is to receive public assistance and health care.

Chrysler Corporation, just a few weeks ago, signed a pact with the Auto Workers Union that will cover approximately 50,000 people under a prepaid dental care program. I have not read the precise provisions of the pact, so that I don't know whether it is what is called a closed panel, which would imply union-operated clinics, or an open panel program.

431a

1 I saw in the paper the other day that the Ford
2 Motor Company had been threatened with a strike. I don't
3 know whether dental care will be part of the fringe benefit
4 package that will be ultimately decided on there. I think
5 it is reasonable.
6

7 In California, the longshore workers' union has
8 for some years been provided with dental benefits. They
9 operate their own clinics. They are run by professional
10 managers.

11 I believe that as this type of establishment,
12 group practices, grow more prevalent, it is possible that
13 we will see in the dental market what happened to the surgical
14 market historically, that is, the splintering of the market,
15 a tendency to specialize in certain areas.

16 In the surgical market you have stores that tend
17 to specialize in hospitals. You have some stores that
18 tend to call on individual physicians only. You have some
19 that tend to specialize in laboratories.

20 I don't know what the effect will be upon the full
21 line or so-called full services dealers. But I believe we
22 can be sure that the buyer of dental supplies under a group
23 or clinic arrangement will be a much more sophisticated, a
24 more knowledgeable purchaser and one who is considerably
25 more price conscious than the individual dentist who has

432a

1 jgk10
2 worked in what might have been called a cottage-type industry
3 up to this point.

4 In many ways it is regrettable because the dental
5 supply dealer as we know him has created this market. He's
6 gone out, called on a one to one relationship on his customers,
7 has developed an interest in certain products, has been able
8 creatively to sell to him.

9 However, when you have a situation where many of
10 your supplies will probably be sold on a bid basis, a good
11 deal of the personal relationship goes out the window.
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MMP 1 Ellis - direct

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We see now in the metals market, that is, metals used for restorations by laboratories, indications that many manufacturers are quite willing and able to go direct with their shipments. They sell metals, and they sell the techniques for using these, and they franchise the laboratories to use them.

In some instances, tooth manufacturers go the same route. How long it will be before all supplies and equipment are sold this way I can't tell, but I think the indications are quite strong.

THE COURT: If I am a longshoreman, and I go into the union dental clinic, I take it I would see five, ten, fifteen dentists working in separate offices, and I would be assigned to one of them, depending on when I came in?

THE WITNESS: Well, I think they give you a choice, but it would be only from among the dentists on the staff.

THE COURT: Would it be on the order of ten or fifteen?

THE WITNESS: Some of them are quite large.

THE COURT: And these dentists would work on a salary?

THE WITNESS: If they are in a union clinic and employed by the union.

There also exist in California some private groups

434a

1 MMP 2 Ellis - direct
2 that provide dental services to individuals. Dentists will
3 form a private group and will attempt to sign up patients.
4 The state pays, I believe it is, two dollars per patient per
5 month for having these people on their rolls. This is a
6 private form of group practice.

7 One further parenthetical thing: this problem or
8 the potential problem is one that a committee has been formed
9 in the trade association, and they intend to spend the next
10 year studying the possible impact of this on the dealers'
11 market as we know it today.

12 I think, as I indicated, it is a good possibility
13 there could be some remarkable health changes in this country
14 in the next five years.

15 THE COURT: When manufacturers sell direct and
16 when mail order houses sell, they do not employ salesmen to
17 call on the clinics or the dentists?

18 THE WITNESS: Well, they may or may not. Many do
19 not.

20 THE COURT: So to the extent that your fears or your
21 predictions come true, the salesmen, the number of salesmen
22 will diminish?

23 THE WITNESS: I believe so.

24 THE COURT: Salesmen and the dental dealers will
25 rise or fall together?

435a

1 MMP 3 Ellis - direct

2 THE WITNESS: Yes, sir. I believe that probably
3 in some areas of the country there will always be a full-
4 service dealer of one type or another, such as in areas where
5 geographically it is very difficult for dentists to be served
6 in any other way. But I believe their total numbers will
7 diminish.

8 MR. JINKINSON: The defendant offers in evidence
9 Exhibits D, J and K.

10 THE COURT: They are objected to, and the objection
11 is overruled, but subject to a later motion to strike, which
12 I will consider.

13 Mark them, Mr. Clerk.

14 (Defendant's Exhibits D, J and K for identification
15 were received in evidence.)

xxx

16 THE COURT: Mr. Ellis, look at Exhibit D.

17 THE WITNESS: I am sorry, your Honor. I don't have
18 it.

19 MR. JINKINSON: I will give it to you. Your Honor
20 said D?

21 THE COURT: Exhibit D.

22 You got the figures for Healthco from what source,
23 you told us?

24 THE WITNESS: I was given interrogatories in this
25 case which had the Healthco sales from 1968.

436a

1 MMP 4 Ellis - direct

2 THE COURT: And the purchases on Exhibit D: from
3 where did that come?

4 THE WITNESS: That is my own analysis, and it is
5 the supplies part of the bar shown on the exhibit with the
6 bar chart, on this exhibit (indicating).

7 This is total dental products.

8 THE COURT: That is Exhibit B?

9 THE WITNESS: Yes, your Honor. Part of it would
10 be supplies. I had to prepare this analysis by treating the
11 supplies and equipment separately, and this supply total is
12 what I plotted on Defendant's Exhibit D.

13 THE COURT: So purchases on Defendant's Exhibit D
14 come from purchases on Defendant's Exhibit B?

15 THE WITNESS: Could I refer to my notes, your
16 Honor?

17 THE COURT: Of course.

18 THE WITNESS: I wish to correct my preceding state-
19 ment as to the breakdown of the total for the New York market,
20 as to supplies and equipment. This shows percentage increases
21 in total purchases as estimated by me, contrasted to the
22 Healthco sales. This goes to the data also shown on
23 Defendant's Exhibit B.

24 THE COURT: Let's see Defendant's Exhibit B again.

25 Now, Defendant's Exhibit B relates to the purchases

437a

1 MMP 5 Ellis - direct/cross

2 line on Defendant's Exhibit D?

3 THE WITNESS: Your Honor, I testified last week
4 as to some market estimates I made of the total market in the
5 New York Metropolitan Area. The base line here is this bar,
6 the far left hand bar on Defendant's Exhibit B.

7 THE COURT: All right.

8 MR. JINKINSON: I have no further questions. Your
9 witness.

10 THE COURT: All right, Mr. Sirignano.

11 CROSS-EXAMINATION

12 BY MR. SIRIGNANO:

13 Q Mr. Ellis, how many companies are there in the
14 ADTA?

15 A Do you mean all manufacturers?

16 Q First, let's get the manufacturers.

17 A I believe I testified there were approximately
18 eighty-four.

19 Q You stated that these accounted for roughly two
20 thirds of all sales of dental products in the United States.

21 A Yes. May I elaborate on that? I believe I stated
22 in response to a question that there were approximately a
23 thousand manufacturers of dental supplies in the United
24 States. The question -- I forget exactly how it was posed --
25 but that is, looking at it from the point of view of the

438a

1 MMP 6 Ellis - cross

2 dealer, who could order from a thousand different sources,
3 these thousand companies would include such companies as
4 Kodak, General Electric, Westinghouse, companies that one
5 would not normally think of as dental manufacturers, but would
6 make some small portion of their production in dental
7 supplies, and it could be bought by a dealer.

8 The companies that actually dedicate the majority
9 of their production to dental supplies number perhaps between
10 three and four hundred.

11 Q Of those thousand companies that you mentioned,
12 does that include manufacturers of multi-use products?

13 A The point of view that we took in compiling our
14 list was that if it was used in the dental office and the
15 dental dealer would want to stock it, we would count the
16 manufacturer.

17 Q That figure of a thousand would then include all
18 manufacturers, let's say, of paper towels?

19 A No, not all manufacturers of paper towels.

20 Q Don't some dental dealers carry paper towels?

21 A Yes, but paper towels are also available from local
22 paper houses. I think I testified how we collected the list.
23 We asked dental supplies stores to supply us with lists of
24 companies from whom they purchased, products, and we then
25 tabulated in one large list and eliminated duplications.

439a

1 MMP 7 Ellis - cross

2 Q But the vast majority of those did in fact include
3 companies which did not manufacture what might be called
4 purely dental products?

5 A No; I can't say that, because after a hypodermic
6 manufacturer, for example, manufactures hypodermic syringes
7 both for the surgical and the dental market and the dental
8 suppliers bought syringes from him, I would say that company
9 manufactured dental products, but I would not necessarily say
10 that the majority of its production was or was not in dental
11 products.

12 Q How many of those thousand companies were engaged
13 in the manufacture of paper products?

14 A I don't know.

15 Q How many were engaged in the manufacture of paper
16 cups?

17 A I don't know?

18 Q So you are not in position to judge whether or not
19 the majority may or may not have been manufacturers of multi-
20 use items?

21 A When one sets out to tabulate the sales of dental
22 dealers --

23 Q That is not the question I asked, Mr. Ellis.

24 A I am sorry.

25 Q My question is, you are not in position to judge how

440a

1 MMP 8 Ellis - cross

2 many of those one thousand companies were in fact companies
3 which manufactured exclusively multi-use items?

4 A No; I am not in position to judge.

5 Q How many companies represent dealer members of the
6 ADT?

7 A Approximately sixty-four companies.

8 Q With how many outlets?

9 A Approximately three hundred. You realize, this
10 changes from time to time.

11 Q What company has the largest number of outlets?

12 A It would be either Healthco or Litton Industries.
13 I have not counted them specifically.

14 Q There is a doubt in your mind as to which of them
15 has the largest number?

16 A I believe Healthco has about fifty-five, but I am
17 not certain. I believe that Litton Industries has about fifty,
18 but there have been some branch closings by both companies.
19 I have not counted them of late.

20 Q Doesn't Litton have fewer than forty?

21 A I am not certain, I stated.

22 Q I would like to show you the most recent ADTA
23 directory.

24 A That directory is one year old, and I assume that
25 you are asking me questions as you relate to the present time.

441a

MMP 9

Ellis - cross

1 If you have counted them, I will certainly admit that one
2 count is greater than the other.

3 Q I would rather have you refresh your recollection
4 and then I will ask you the question.

5 I take it you have some idea as to how many new
6 branches have been opened and how many have been closed.

7 A Frankly, in only the most general sense, because
8 I don't prepare the mailing lists nor do I prepare this
9 directory. As a matter of fact, I don't handle new applica-
10 tions for membership, nor have I anything to do with companies
11 that withdraw from membership -- I'm sorry --

12 Q I want you to refresh your recollection as to the
13 number of branches the defendants had relative to Litton
14 on the basis of that directory.

15 A This directory was done, I believe, in September,
16 a year ago.

17 THE COURT: This is September 1972.

18 THE WITNESS: I believe that is when it was issued.

19 THE COURT: Mr. Sirignano wants you to tell us,
20 at September 1972 how many outlets did Healthco have and how
21 many did Litton Industries have.

22 MR. SIRIGNANO: The only question is apparently
23 whether in terms of the previous answer there appeared some
24 doubt as to whether Healthco had the largest number of
25

442a

1 MMP 10 Ellis - cross

2 outlets.

3 THE COURT: Well, the doubt is, I take it, as of
4 the present time?

5 THE WITNESS: Honestly, in looking at this, I can't
6 tell. I can go through the whole directory and count state
7 and city, but under Healthco it lists a number of subsidiary
8 companies. It does not list the number of companies each one
9 has. To count them, I would have to go state by state and
10 city by city.

11 Q Is there a serious doubt in your mind that Healthco
12 is the largest in terms of national outlets in the ADTA?

13 A I said there is doubt in my mind. I have not counted
14 them lately. I stated it was either that company or Litton
15 Industries. I believe that is a reasonable answer, isn't it?

16 Q You stated earlier that ADTA manufacturer members
17 accounted for roughly two thirds of the manufacture of dental
18 products; is that correct?

19 A Yes, as the Census Bureau lists manufacturers of
20 dental products.

21 Q Is it also true that ADTA dealer members have over
22 the years accounted for two thirds of the sales of dental
23 products by dealers?

24 A Generally, yes, over the years. In one year it might
25 be a little higher or lower, but that is generally true.

443a

1 MMP 11 Ellis - cross

2 Q Does that continue to be true?

3 A Up to what point? I would say it has been generally
4 true.

5 Q Was it true between the period 1968 and 1970?

6 A I have not studied it, but I think that probably
7 would be reasonable.

8 Q Now, you mentioned a true in terms of purchase of
9 dentist's products by dentists, which have led you to believe
10 that there is greater utilization of mail order houses. You
11 mentioned observing a trend of dentists making purchases from
12 mail order houses over the last ten years; is that correct?

13 A No. It is not. I mentioned the trend of total
14 purchases of dentists over the last ten years, and I pointed
15 out that the trend of dentists' buying habits was rising at
16 a faster rate than dental dealer sales.

17 Q When did you notice that trend taking place?

18 A Excuse me. I will have to look at one of the
19 exhibits.

20 On Defendant's Exhibit J, two indexes are plotted
21 are plotted of purchases by dentists of supplies and dealer
22 sales. The two lines on the chart are in quite close congru-
23 ence from 1961 to 1964. From 1964 to 1967, they diverge at
24 a moderate rate. Beyond 1970 they diverge at a much more
25 rapid rate.

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1 MMP 12 Ellis - cross

2 Q Does sharp divergence take place in 1970?

3 A Yes.

4 Q You mentioned several Census Bureau figures that
5 you looked at, the figure of \$315,000,000 representing sale
6 of dental products in 1967; is that correct?

7 A The exhibit that I was given -- I believe it is
8 Plaintiff's Exhibit 20 -- shows that there were 655 stores
9 classified by the Census Bureau to be dental supply dealers,
10 and their sales were approximately \$315,000,000.

11 Q I believe you said that this constituted total
12 sales of dental products in the United States?

13 A No; I did not. Again, there is a distinction here.
14 These are sales of dental products by companies classified
15 as dental supply stores; total sales of dental products by
16 all professional equipment and supply dealers was the figure
17 I referred to. But the difference was quite small. It was
18 only a million dollars, approximately, for 1967.

19 Q Which is the figure you testified fairly represented
20 the sales of all dental supplies in the United States?

21 A Fairly represents the sales of all dental supplies
22 in the United States?

23 Q Yes.

24 A In what year?

25 Q In 1967.

445a

1 MMP 13 Ellis - cross

2 A Well, the Census Bureau tabulated it at \$315,854,000.

3 Q You yourself, though, have made estimates and
4 studies with respect to total sales of dental supplies in the
5 United States, haven't you, independent of the Census?

6 A Yes; I have.

7 Q On the basis of that, you have made estimates, for
8 instance, for the year 1967 of total sales?

9 A That is somewhat of a loaded question. I did make
10 an estimate for '67 in order to prepare an estimate for '68.
11 Does that fairly answer the question?

12 Q No. You have independently of this lawsuit at
13 other times prepared estimates of total sales of dental
14 products to dentists, dental laboratories and institutions?
15 In 1967, haven't you?

16 A No; I prepared an estimate of total purchases by
17 dentists.

18 Q Purchases by dentists? And what was the figure?
19 Is that figure comparable to the census figure of \$315,000,000?

20 A Yes, I know -- I am contemplating for a minute --
21 there might be some differences in definition. But
22 Plaintiff's Exhibit Number 20 shows the sales of stores
23 classified as dental supply stores. I am not -- are you
24 asking me, do I consider this reliable?

25 Q No. I first want to establish what you believe to

446a

1 be the basis of whatever sources, including sources which
2 you have relied upon in the past, estimates which may have
3 nothing to do with the lawsuit, as to what the total purchases
4 by dentists, dental laboratories and institutions of dental
5 products in 1967 were.

6 A I didn't prepare an analysis exactly in that fashion.
7 Can I refer to my notes for a minute? I might be able to
8 give you a figure for '68, if I have prepared it.

9 Q All right. '68 or '67.

10 A What I am looking for are the figures that under-
11 lay the graph on trends in dentists' purchases. To do that
12 graph, I had to take the total national dental bill and
13 apply a percentage against it to determine the estimate for
14 the purchases in order to do the graph.

15 Would that satisfy the question?

16 Q Mr. Ellis, all I would like to know is, what
17 figure are you satisfied with that fairly represents total
18 sales of dental products -- or, put it this way: total
19 purchases of dental products by dentists, dental laboratories
20 and institutions in 1967?

21 THE COURT: Do you have the question in mind, Mr.
22 Ellis?

23 THE WITNESS: Yes; I have the question. I have not
24 done the analysis.

25 447a

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MMP 14(a)

Ellis - cross

495(a)

THE COURT: Suppose you think about it. We have got to stop now, Mr. Sirignano, for a few minutes, and I will have to turn to the other case.

Mr. Reporter, will you give to Mr. Greenberg that last question, so you can leave us now?

(Recess, during which another matter was heard.)

448a

1 THE COURT: Now do you have the answer to Mr.
2 Sirignano's question?
3

4 THE WITNESS: Am I correct that you asked me
5 what figure am I satisfied with is the whole dental market
6 for 1968?

7 Q Yes.

8 MR. JINKINSON: In the U.S.?

9 MR. SIRIGNANO: In the U.S.

10 A I have not. I checked my notes. I did not prepare
11 an analysis on that, but I would state that the figure is
12 over \$315,000,000.

13 Q How much over?

14 A I have not prepared an analysis, Mr. Sirignano,
15 and I would have to go through a number of reports on the
16 same basis that I did the analysis on the New York metrop-
17 olitain area. I just did not do a national study for
18 that year.

19 Q Now, according to your previous testimony, all
20 sales by dental dealers in the U.S. you are satisfied with
21 are correctly reflected by the census figures of 315,000,000,
22 is that correct?

23 MR. JINKINSON: For the year 1967?

24 MR. SIRIGNANO: For the year 1967.

25 A Yes.

449a

1 jgk2 Ellis - cross 497
2 Q Didn't you assist in ^{MAKING} an analysis of total
3 dental product sales in 1967 in connection with a case of
4 U.S. versus Sybron?

5 A Yes, I did an analysis for that. Frankly, it was
6 done four or five years ago, and I --

7 Q In August of 1969.

8 A And I don't remember the figures. I have not
9 looked at that affidavit in many years.

10 Q Does the figure of \$357,000,000 for total sales
11 in 1967 refresh your recollection?

12 A No, honestly it doesn't, and I don't have that
13 affidavit with me.

14 Q I ask you to look at page 9 (handing.) Tell me
15 if this refreshes your recollection.

16 MR. JINKINSON: Page 9 of his affidavit?

17 MR. SIRIGNANO: No. This is a ~~totaly~~ different
18 document that is being shown to the witness for the purpose
19 of refreshing his recollection. If you would like to look
20 at it, please do.

21 MR. JINKINSON: Do you have a copy of it?

22 A Page 9 is from an affidavit prepared by Dr. Michael
23 Gort.

24 Q That's correct. You and Dr. Gort worked together
25 in working out these figures, did you not?

1

2

A Is my affidavit in here?

3

Q Yes, it is.

4

A May I refer to that rather than Dr. Gort's?

5

Q By all means.

6

(Pause.)

7

8

A On page 9 it states that the market estimate of distributors' sales of dental products in 1967 were \$357,000,000 approximately. I have not had time to reread my own affidavit and I haven't read it since the time I prepared it. But I will stand on that figure.

9

10

11

12

Q You will stand on the figure 357,000,000?

13

14

A Yes. I said earlier it was about 315,000,000. I had forgotten that I did this affidavit.

15

Q \$357,000,000 --

16

A Approximately.

17

Q In '67 and 398,000,000 in '68?

18

MR. JINKINSON: May I see a copy of the document, if you have it?

19

20

THE COURT: Yes.

21

(Document handed to Mr. Jinkinson.)

22

A That's what it says here, yes.

23

24

25

Q Beyond what it says, are you now satisfied, having refreshed your recollection, that the figure of 357,000,000 represents purchases of dental products in 1967 throughout

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1
2 the U.S. and 398 --

3 A This was my best estimate of the market with the
4 sources I had available to me in August of 1969.

5 Q Since that time have you --

6 A I have not prepared a subsequent analysis of
7 these precise years. The figures are greater than the
8 \$315,000,000 figure I stated would be a minimum earlier.
9 The best I can say is that at this point in time they look
10 reasonable.

11 Q And at this time do they look reasonable?

12 A Yes.

13 Q Mr. Ellis, I would like to have you ~~examine~~ Plaintiff's
14 Exhibit 26 (handing) . Do you recall testifying earlier
15 with respect to this?

16 A Yes, I do.

17 Q I believe you mentioned, you stated at that time,
18 that the definitions as stated in there would lead to
19 confusion, is that correct?

20 A I didn't say that they would. I said that there
21 was a possibility that they would because I could find no
22 sheet that set forth what the definitions meant. I can't
23 conclude that they would or they wouldn't on the basis of
24 the questionnaire.

25 THE COURT: Mr. Sirignano, I'm sorry, but we will

1 jgk
2 have to interrupt again. I have to turn to the other
3 matter.

4 Mr. Jinkinson, do you want to look, during this
5 recess, at this paper that was shown to the witness?

6 MR. JINKINSON: Yes. I have a copy of it, your
7 Honor.

8 THE COURT: All right. There is no problem.

9 All right. We will resume just as quickly
10 as I can.

11 (Recess.)

12 THE COURT: Gentlemen, we will stop today at
13 12:30. I have now got a third case to deal with. And we
14 will come back at 2:00. You may have to wait a few minutes
15 at 2:00 because I will have to deal with the third case at
16 2:00. But that, I am told, won't take very long.

17 All right. I believe we had an answer to your
18 last question, Mr. Sirignano?

19 MR. SIRIGNANO: I am not sure, your Honor.

20 A Will you repeat the question?

21 MR. SIRIGNANO: I would like to ask the reporter
22 to.

23 A I believe you just asked me to look at the
24 questionnaire.

25 THE COURT: Do you have the last question, Mr.

1
2 Reporter?

3 (Question read.)

4 Q Do I understand that you believe there is an
5 inadequacy of this survey form, that it failed to attach
6 a sheet with the definitions set forth more fully, is that
7 correct?

8 A I think so. I think this is a common practice.

9 Q You mentioned in your testimony --

10 THE COURT: Wiat. Is it a common practice to
11 attach a sheet with definitions or a common practice to do
12 it as the government did?

13 THE WITNESS: Either way. But some of these
14 things are not fully defined.

15 THE COURT: What is the common practice to which
16 you referred?

17 THE WITNESS: I believe it is done both ways. It
18 is printed on the sheet or attached as a sheet. But there
19 is usually, in many surveys, one fully defines things.

20 For example, would you like me to point out some-
21 thing on here that might be an inconsistency.

22 Q Please do.

23 A For example, in dental equipment. Where would one
24 put a handpiece? There are handpieces that sell at different
25 price levels. Where would one put a waste receptacle or

454a

1 waste basket? This is non-consumable product, but it is
2 not specified. That type of thing.

3 Q Generally the handpieces to which you refer sell
4 for around a hundred dollars?

5 A Some do and some don't.

6 Q What handpieces presently sell for under a hundred
7 dollars?

8 A I am not a product expert, but I would say that
9 generally one's air turbines, that type of thing, tend to
10 cost considerably more. The belt or pulley-driven handpiece
11 I believe costs under a hundred dollars. I am not certain
12 of that, though.

13 THE COURT: What is a handpiece?

14 THE WITNESS: A handpiece is the operating instru-
15 ment that -- it is a rotary cutting tool and it contains a
16 burr or cutting instrument which the dentist uses to drill
17 teeth, your Honor.

18 THE COURT: Oh, that's the thing he puts in your
19 mouth with the drill on it?

20 THE WITNESS: Yes, sir. That is the torture
21 instrument.

22 THE COURT: And also he uses the same thing to
23 clean your teeth. It has a rubber suction cup.

24 THE WITNESS: Right.

25 455a

THE COURT: I understand what it is now. All right.

Q Would an ADTA member have any difficulty in classing that as a piece of equipment?

A For what purpose?

Q When he normally refers to a piece of dental equipment, would he not take a handpiece to be a piece of dental equipment?

A Well, of course, in his own operation he could define it any way he wanted. But for the purposes of reporting on our reporting forms, we ask that he use the dollar limit figure we talked about earlier.

Q In other words, the only possible confusion that can arise has to do with items which would sell for under a hundred dollars?

A No, not necessarily. Every item that sells for more than hundred dollars that would be equipment is not enumerated here.

Q Oh, you think it is necessary to enumerate every item of equipment which sells for over a hundred dollars before a dental dealer would be able to determine what the figure to put there opposite the term dental equipment?

A I'm not sure that would be possible because not all dealers would carry nor might they even be familiar with

456a

2 every possible non-consumable equipment item.

3 Q If they didn't carry the item, there wouldn't be
4 any problem in their reporting their dollar sales, would
5 there?

6 A That's true.

7 Q Now let's take the examples that are on that
8 sheet. Do you know of any dental dealer, ADTA or other-
9 wise, who would conceivably consider a dental chair as a
10 sundry or other than a piece of equipment?

11 A Well, you are asking me to read someone else's
12 mind, and I don't know that I know the answer to the
13 question. You say do I know of any other dealer who would
14 conceivable consider a dental chair a sundry?

15 Q Yes.

16 A I don't know that. I don't think that it is
17 likely.

18 Q You have come in contact with a lot of dental
19 dealers in the course of your years with the ADTA, haven't
20 you?

21 A Yes.

22 Q Including dealers who are not members of the ADTA,
23 haven't you?

24 A Well, to a very limited extent.

25 Q Do you know of any dental dealer, ADTA or otherwise,

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1 who would classify a dental unit as other than a piece of
2 equipment?
3

4 A Again my answer would parallel the preceding
5 answer. I don't know because I don't know every dental
6 dealer either.

7 Q You could not from your 20 years experience reg-
8 ister an opinion as to whether it is likely that any dental
9 dealer who is in the business of selling equipment would
10 classify a dental unit as anything but a piece of equipment?

11 A Mr. Sirignano, in today's market I would point out
12 that the attempt to classify a dental unit today is
13 an extremely difficult matter. You have the so-called
14 console type units, you have split units, you have his and
15 her type units, you have dentist units where the assistant
16 portion is independent. You saw a survey done by Dental
17 Products Reports magazine in which they had to draw pictures
18 of the various types of units in order to elicit a response
19 as to whether or not the dentist had purchased them.

20 I think dental unit today is a very difficult term
21 to define.

22 Q I am not talking about dentists, Mr. Ellis. I am
23 talking about dealers who sell dental equipment. Are you
24 telling me that on the basis of your experience it is your
25 opinion that there is a dental dealer somewhere who would

458a

1 classify a dental unit as a sundry?

2
3 A I don't know that. It would depend on the cost
4 too, wouldn't it? If he had a piece of equipment which
5 should be used as a unit is used and it costs under a
6 hundred dollars, would you want it classed as a consumable,
7 as a sundry here or would you want it classed as equipment?
8 It doesn't state that on the questionnaire.

9 Q Have you ever seen a dental unit which costs less
10 than five hundred dollars?

11 A Of course I am not a products specialist. I think
12 you understand that. And I think this question more properly
13 could be asked of a dealer. But I have seen some very
14 small cart-type unit units which may well cost under five
15 hundred dollars. I don't know their prices.

16 Q Now, apparently you also find inadequate in this
17 survey form the fact that approximations or estimates were
18 requested, is that correct?

19 A Insofar as they are asked to divide their total
20 sales to customer classes, I believe I testified that I felt
21 that way, yes.

22 Q Do you believe that it would not be proper survey
23 procedure to ask for that type of estimate?

24 A You mean to ask the respondent to estimate?

25 Q Yes.

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1 A Certainly it wouldn't be the most reliable basis
2 on which to collect information, particularly in this case
3 when the information could be gleaned but it would be very
4 difficult to do so. One would have to go back over records
5 several years old and do a great deal of compellation to
6 answer the questions specifically. When one invites them to
7 estimate, I think most respondents would take the easier
8 course and would estimate the figure.

9 Q With respect to the geographic area, you felt
10 there were certain inadequacies about that question, did
11 you not?

12 A I believe I testified that most dealers kept
13 their sales figures classified by sales territory so they
14 could commission their salesmen, and it is my experience
15 that the sales territories rarely included the same boundaries
16 as counties did.

17 Q Is there any doubt in your mind that the average
18 dental dealer will know at least in what counties he does
19 business?

20 A Yes, because he would have demarcation lines drawn
21 where his salesmen were to cover. He would know what the
22 sales territories were. He would know; yes, he would.

23 MR. WEISS: I ask there be marked for identification,
24 and offered in evidence Plaintiff's Exhibit 29, which consists
25

1 of pages 7-377 through 7-379, 7-383, 7-384, 7-387 through
2 7-391, 7-399 and 7-411 from a Department of Commerce public-
3 ation titled "1967 Census of Business Wholesale Trade
4 Commodity Line Sales."
5

6 This publication is the same publication from
7 which Defendant's Exhibit A has been taken.

8 THE COURT: Where is the document physically?
9 Let's deal with one at a time.

10 MR. WEISS: Here is the document.

11 THE COURT: All right. Has counsel seen it?

12 MR. WEISS: I will have a copy for counsel.

13 MR. JINKINSON: I have no objection, your Honor.

14 THE COURT: All right. Without objection, it
15 will be received.

16 (Plaintiff's Exhibit 49 was received in evidence.)

17 MR. WEISS: I would also like to mark for identif-
18 ication and offer into evidence Plaintiff's Exhibit 50,
19 which is the 1967 census of business questionnaire form
20 CB-50J, which served as the basis for eliciting the infor-
21 mation found in Defendant's Exhibit A from the same overall
22 publication.

23 THE COURT: Any objection, Mr. Jinkinson?

24 MR. JINKINSON: No objection, your Honor.

25 THE COURT: Mark it.

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(Plaintiff's Exhibit 50 was received in evidence.)

BY MR. SIRIGNANO:

Q Now, Mr. Ellis, you have in the course of your direct testimony set forth many answers which placed reliance on census information, is that correct?

A Yes.

Q You believe census material to be reliable.

A Generally so, yes.

Q You believe that the techniques used by the census bureau tend to follow good practices of eliciting information, do you not?

A Yes.

Q I would like you to examine Plaintiff's Exhibits 49 and 50 and Defendant's Exhibit A (handing) .

A I have look at them.

1 Q Mr. Ellis, you see this questionnaire requests data
2 with respect to the sales of dental equipment, dental
3 sundries, artificial teeth and dental precious metals? Is
4 that correct? Dental gold?

5 A That is correct.

6 Q These are the same four general categories which
7 the plaintiff's questionnaire dealt with?

8 A Yes.

9 THE COURT: The questionnaire is Exhibit A?

10 THE WITNESS: This is Plaintiff's Exhibit 50.

11 THE COURT: Plaintiff's Exhibit 50.

12 MR. SIRIGNANO: The Census Bureau questionnaire,
13 the answers to which were compiled in Defendant's Exhibit A.

14 THE COURT: All right.

15 Q Have you ever seen that before this time, Mr. Ellis?

16 A Yes; I have. It has been some time, but I have
17 seen the questionnaire before.

18 Q This does not contain any attached sheet of long
19 definitions, does it?

20 A No, but at the top of each form there are quite a
21 few instructions for the respondent to use.

22 Q What is the definition that is placed there for
23 dental equipment?

24 A There is none -- Wait a minute. There is none on
25

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1 MMP 2 Ellis - cross

2 the sheet where the dental equipment is shown -- yes; there
3 are parentheses which show "Chairs, X-rays, Cabinets,
4 Engines" et cetera.

5 Q There is no reference to anything under \$100?

6 A No.

7 Q In fact, that definition is less specific than the
8 definition contained on the plaintiff's survey sheet -- or
9 survey form?

10 A Yes; the --

11 Q The sundries definition is less specific, is it not?

12 A Yes; it says "Sundries, Merchandise".

13 Q But no definitions?

14 A That is correct.

15 Q In fact, therefore, any criticisms of the definitions
16 as to equipment, sundries, artificial teeth and dental gold
17 which are applicable to the plaintiff's survey form are
18 equally applicable to the Census Bureau, aren't they?

19 A I think that is a fair statement, yes.

20 Q Now, doesn't the Census Bureau questionnaire re-
21 quest information regarding classes of customers?

22 A I am not certain. May I look at the questionnaire?

23 Q By all means. Take your time.

24 A Yes; it does. It has some broad categories of
25 class of customer information.

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1 MMP 3 Ellis - cross

2 Q So to the extent that plaintiff's survey form
3 should be criticized with regard to information about classes
4 of customers, the same criticism should apply to the Census
5 Bureau form?

6 A They are not asking for the same information.

7 Q But they do ask for classes of customers?

8 A Yes; they do.

9 Q So the fact that classes of customers is requested
10 is equally a basis of criticism of the Census Bureau form as
11 the plaintiff's survey form?

12 A I am not sure I am willing to go that far, because
13 they set forth definitions of the classes of customers.

14 Q Didn't you say previously, in your previous testi-
15 mony, that generally dental dealers do not have available
16 information as to class of customers?

17 A It was my judgment.

18 Q And the Census Bureau form has requested information
19 from dental dealers as to classes of customers?

20 A The -- Although the class of customer information
21 is not the same.

22 Q But they both asked for information as to the class
23 of customer?

24 A Yes.

25 Q You previously testified that in 1967, which is the

465a

1 MMP 4 Ellis - cross

2 time of the Census survey, a dental dealer was not likely to
3 have information as to his class of customers?

4 A No; I don't think so. I think they probably would
5 have estimated in both cases.

6 Q Doesn't the census survey form also instruct the
7 writer to supply estimates when book records are not avail-
8 able?

9 A Yes; if book figures are not available, enter your
10 best estimate.

11 Q So to the extent that the Government form should be
12 criticized in that regard, that criticism of the Government's
13 form is equally applicable to the census questionnaire?

14 A As to the manufacturers' questionnaire that I
15 criticized, I said that I felt that that breakdown of the
16 customer class and in the various commodity areas were probably
17 estimated. I felt probably that most respondents were giving
18 estimates on the census bureau form, as they did not have
19 this information available.

20 Q So to the extent that it is a failure of the
21 Government's survey, it is equally a failure of the census
22 bureau survey?

23 A These are not the same. In general, yes, that is
24 true.

25 Q Will you hold on to the material you presently have,

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1 MMP 5 Ellis - cross

2 Mr. Ellis. I ask you to look at Defendant's Exhibit B.
3 Defendant's Exhibit B consists of several graphs, in effect
4 comparing your estimate of the market, the census figures for
5 the market as reflected in Defendant's Exhibit A and Plaintiff's
6 Exhibit of the market, as reflected in plaintiff's survey;
7 is that correct?

8 A That is correct. May I elaborate?

9 Q Please do.

10 A At the same time, I believe in testimony I pointed
11 out the deficiencies of that. I felt my estimate was under-
12 stated to some extent. I pointed out that I had extrapolated
13 the Census Bureau survey in the sense that they are not
14 strictly comparable, but your statement is essentially cor-
15 rect.

16 Q What is the basis of that non-comparability?

17 A Well, I testified to the fact that the estimate I
18 made of purchases probably understated the full extent of the
19 purchasing figure. My estimate did not include Federal
20 dentists; it did not include dental students --

21 Q Let's get some clarification --

22 THE COURT: I am not sure he finished his answer.

23 (To the witness:) Had you finished your answer?

24 A Well, I have pointed out that the Census Bureau
25 data was taken in 1967, that the other figures plotted on the

467a

1 MMP 6 Ellis - cross

2 graph were for 1968. Therefore, I extrapolated the Census
3 Bureau figures. I am finished.

4 THE COURT: Now we can go ahead.

5 Q I believe you stated that you thought both the
6 Census Bureau figures and your method of measuring the market
7 was superior to the plaintiff's; is that correct?

8 A I pointed out that the Census Bureau canvass was
9 taken on approximately the same basis as the plaintiff's sur-
10 vey, the concept of listing the companies who had received
11 the questionnaire and then tabulating the responses. I
12 pointed out that the analysis I had prepared was done based
13 on dentists' expenditures.

14 Q In terms of either the Census figure or your
15 analysis, could you rank any company?

16 A Could I rank a company?

17 Q Yes.

18 A By name?

19 Q Yes.

20 A No.

21 Q Could you rank the defendants? Could you tell
22 the defendant's position in the market on the basis of your
23 analysis or the census analysis?

24 A No. I used dentists' purchase figures irrespective
25 of what company they were purchased from. The Census Bureau

468a

1 MMP 7 Ellis - cross

2 can't reveal the names of its respondents.

3 Q You mentioned the Census Bureau making formulations
4 on the basis of manufacturers?

5 A Yes.

6 Q If the Government had gone to the Census Bureau to
7 request such information or to request such a survey, would
8 the Census Bureau have given the names of any of the
9 companies surveyed?

10 A No; they would not.

11 Could I elaborate on that answer a little?

12 Q By all means.

13 A One of the difficulties in preparing information
14 for this case, I think for all concerned, is the timing.
15 First of all, the analysis that I did was originally either
16 in late 1969 or early 1970. I am not certain when the
17 Government's survey was taken, but I believe it was following
18 1970, because the year '70 was included in the questionnaire.
19 Some of these data that we have seen on the exhibits here
20 were not published until March of 1971.

21 I don't know, as I said, whether the Government's
22 survey was done before or after March of 1971. If it was
23 done after, then some of these tables were available to you
24 at that time. But before that time, the Government could
25 have asked for a special tabulation of Standard Industrial

469a

1 MMP 8 Ellis - cross

2 Classification 50861 for the New York, Northeastern New
3 Jersey Metropolitan Area, and while I realize the data you
4 wanted to collect was for '68, '69 and '70, it would never-
5 theless have given some pertinent data in broad terms.

6 Q It would not have given the rank of any company?

7 A No. The Census Bureau special tabulation would not
8 have done that.

9 Q Nor could anyone ascertain the rank of any seller
10 on the basis of your tabulation?

11 A No.

12 Q Or the concentration figures on the basis of your
13 tabulation?

14 A I am not sure I understand what you mean by that.

15 Q Could you, on the basis of your tabulation, ascer-
16 tain what percentage of the market as you had tabulated it
17 the first four sellers represented? The first eight? The
18 first six? The first ten?

19 A No.

20 Q This is not your first contact with a Section 7
21 case, is it?

22 A In my lifetime I have prepared data for three
23 cases. I don't know what a Section 7 case is. When I was
24 with the Labor Department, we prepared some data for the
25 Justice Department when they sued the Brown Shoe Company.

470a

1 MMP 9 Ellis - cross

2 Earlier, I prepared an affidavit in the case of Sybron, and
3 in this case I prepared some information. I don't know if
4 any of those others were Section 7 cases or not.

5 Q For your information, they each were.

6 You are aware generally, are you not, that in
7 merger cases the ranking of the companies which may have
8 merged and concentration are factors which get involved in
9 evaluating the market?

10 A Quite frankly, I am not.

11 MR. JINKINSON: Just a moment. I object to the
12 question on the ground that it is asking the witness for a
13 legal opinion.

14 THE COURT: Read the question.

15 (Question read.)

16 THE COURT: What is wrong with that?

17 MR. JINKINSON: He is asking the witness for a
18 legal opinion.

19 THE COURT: He is asking the witness whether or not
20 these are factors which get involved in evaluating the market.
21 I don't think there is anything wrong with it. I will permit
22 it.

23 (To the witness:) You may answer.

24 A I don't really know. In each of these three in-
25 stances I named, all I was asked to do was make a market

471a

1 MMP 10 Ellis - cross

2 estimate of some giventhing. I am sure I don't put the same
3 portent on it that a lawyer would.

4 THE COURT: You are not aware that ranking is a
5 factor that gets involved?

6 THE WITNESS: It seems to me reasonable that it
7 would be, but it carries no great relative importance.

8 Q Earlier in your testimony last week, when you
9 stated that the Census figures and your analysis of the market
10 was superior to the Government's analysis of the market, you
11 did not take into consideration the possible necessity of
12 ranking companies or getting concentration figures?

13 A No.

14 Q And, in fact, only the Government's survey or some
15 similar survey would enable a person to obtain rankings with
16 regard to people in the market and people not in the market?

17 THE COURT: You mean rankings as to size?

18 MR. SIRIGNAN: Relative size, number one, number
19 two, number three.

20 Q (Continuing) Is that correct?

21 A Yes.

22 Q And only the Government's method would enable one
23 to ascertain the concentration within that market?

24 A That was the purpose for which the data were being
25 gathered, yes.

472a

1 MMP 11 Ellis - cross

2 Q I ask you to look at Defendant's Exhibit B. The
3 first graph is a graph of the analysis which you prepared;
4 is that correct?

5 A Yes.

6 Q That involves purchases by dentists and dental
7 laboratories within the Metropolitan New York Area?

8 A As best I can estimate it, yes.

9 Q But it doesn't purport to have within it any
10 purchases made outside the Metropolitan New York Area?

11 A I am sorry. I used figures for dentists located
12 in the New York Area. Do you mean where they might go out
13 of the area and buy it somewhere else and bring it back?

14 Q No. I am saying that this does not cover anything
15 but purchases actually made within the Metropolitan New York
16 Area.

17 A Yes. I have testified also that there were some
18 segments of the market which I was unable to estimate.

19 Q Now, the third part of the graph, which is the
20 Government's survey, that again deals only with sales to
21 dentists, dental laboratories and in this case also agencies
22 and institutions made within the Metropolitan New York market?

23 A That was my intention. The figures which I received
24 from which I prepared this graph are changed slightly from the
25 exhibits, but I think the difference is not a great one from

473a

1 MMP 12 Ellis - cross

2 a pictorial point of view on the graph.

3 Q But you believe that the first graph and the
4 third graph are dealing with comparable subject matters?

5 A Yes.

6 Q One stated in terms of purchases and one stated in
7 terms of sales?

8 A I attempted to do that, yes.

B 3 9 Q Now, the middle figure, which is a census figure,
10 if that contains sales outside the New York area, then those
11 totals would be comparable, would they not?

12 A If it contains sales of companies located in the
13 area and went to purchasers outside the area.

14 Q And the figures of purchases outside the area were
15 included: would that not be comparable to the other two,
16 would it?

17 A It would be comparable to the plaintiff's survey
18 before the subtraction was made for shipments outside the
19 area.

20 Q Wait a second. You just testified -- and I believe
21 you have acknowledged -- that the plaintiff's survey and the
22 graph with which you have contrasted that middle figure only
23 deals with sales within the Metropolitan New York Area?

24 A May I go back and look at Plaintiff's 32?

25 Q By all means.

474a

1 MMP 13 Ellis - cross

2 A I don't believe I have all the data here from
3 which this graph was prepared. My attempt was to show com-
4 parability, and I don't have the figures that show the dollar
5 amount of shipments out of the area as tabulated by the
6 plaintiff in this case. Could I look at those?

7 Q There is no evidence in this case as to that.

8 A Then evidently I used the total figure as stated.

9 "Sales in Metropolitan New York Area."

10 Q We have agreed -- and I don't believe there is any
11 difference between us -- that Graph Number 1 and Graph Number
12 3 are comparable in that they attempt to measure one through
13 sales and one through purchases, sales to consumers within
14 the Metropolitan New York area.

15 A To the extent that it is recognized that the analysis
16 that I did did not include certain types of purchasers.

17 Q My question to you is as to the graph which repre-
18 sents the census figures. That is \$54,000,000, is it?

19 A About \$55,000,000, yes.

20 Q 55,000,000. If that 55,000,000 included sales by
21 the receivers of the questionnaire whcih were made outside
22 the Metropolitan New York Area, that figure of 55,000,000
23 would not be comparable to either your analysis of the
24 plaintiff's analysis, would it?

25 A This would mean that -- excuse me -- the difference

475a

1 of 55,000,000 and 31,000,000 dollars would have to have been
2 shipped out of New York to customers located outside the
3 area.

4 Q I did not ask you that.

5 MR. SIRIGNANO: I move that that answer be stricken.
6 I want an answer to my question.

7 THE COURT: Wait. Wait. We cannot possibly get
8 a record if you gentlemen interrupt each other and if there
9 are two people talking at the same time.

10 MR. SIRIGNANO: I beg your pardon.

11 THE COURT: I am only making that remark not as a
12 rebuke but just to call to counsel's attention and the
13 witness that we can't all talk at the same time, because the
14 reporter, who is an expert, no matter how expert, can't get
15 it down.

16 All right. Let's start it over again.

17 Q Let me repeat my question to you, Mr. Ellis.

18 If that graph based upon the census figures contained
19 figures for sales outside Metropolitan New York, then it would
20 not be comparable to your analysis or the Government's ana-
21 lysis, would it?

22 A May I make the assumption that the Government's
23 figures do not include sales outside the New York Metropolitan
24 Area?
25

476a

1 MMP 15 Ellis - cross

2 Q It does not include sales.

3 A If so, that would be true. I stated t at. That
4 is why I felt the Census Bureau data did not present an
5 accurate portrayal of the market, that it does not take cog-
6 nizance of goods shipped out of the market and into the mar-
7 ket.

8 Q Now, among those sellers are mail order houses?

9 A Sellers located in New York or outside?

10 Q Sellers covered by the census survey.

11 A I would think so.

12 Q Assuming there are mail order houses who sell
13 ninety per cent of their total sales outside the Metropolitan
14 New York Area, that figure would be included in that?

15 A I can't make that assumption.

16 THE COURT: We have to stop here. I am sorry. We
17 will recess until two o'clock, but I think you better wait
18 at two o'clock until I have disposed of the matter that I
19 have set down for two o'clock.

20 I don't know whether you want to leave your papers
21 there or not. We will reach you very shortly after two
22 o'clock.

23 (A luncheon recess was taken.)

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1 JGP 8

2 THE COURT: And I felt that if you had his direct
3 examination now, you could do something this afternoon and
4 then, of course, having in mind his direct examination, you
5 would have overnight to prepare.

6 I am trying to balance your convenience against
7 interrupting Mr. Ellis over your objection.

8 MR. SIRIGNANO: I understand. I thank you.

9 THE COURT: All right. Let's try Mr. Cyker.

10 Do you have any reason why you want Mr. Ellis
11 excluded during this testimony?

12 MR. SIRIGNANO: I don't, Your Honor.

13 THE COURT: All right. So Mr. Ellis can sit here
14 in the courtroom.

15 M A R V I N M E Y E R C Y K E R , called as a witness
16 by the Defendant, being first duly sworn, testified as
17 follows:

18 DIRECT EXAMINATION

19 BY MR. JINKINSON:

20 Q Where do you reside?

21 A In Newton, Massachusetts.

22 Q Right outside of Boston?

23 A Yes, sir.

24 Q What is your business?

25 A I am the president and chief executive of Healthco.

478a

1 JGP 9 Cyker - direct

2 Q And what business is Healthco in?

3 A Healthco is in the dental supply business, dental
4 laboratory business and, to a limited extent, in the medical
5 supply business.

6 Q When did you first become engaged in or connected
7 with the dental supply business?

8 A I came to this country in 1947, Thanksgiving, and
9 I got a job in December of '47 as an errand boy in a supply
10 company in Boston.

11 Q Was that a dental supply house?

12 A Yes; it was a dental supply house.

13 Q And in what capacity were you engaged?

14 A I was engaged as an errand boy.

15 Q And for how long did you stay an errand boy?

16 A I was an errand boy, let's say, six months, nine
17 months, and then I was a stock boy, errand boy, receiver,
18 shipper, all-around boy.

19 Q And then did you finally become a salesman for
20 them?

21 A Yes. I believe in 1950-'51 they put me out on the
22 road for a couple of days a week.

23 Q And what were your duties as a salesman?

24 A My duties were to call on dentists and create new
25 business for the company.

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1 JGP 10 Cyker - direct

2 Q Selling dental supplies?

3 A Selling dental supplies, yes.

4 Q And what does that include? Sundry products,
5 equipment?

6 A In those days, this was quite a small company, and
7 we mostly sold sundries -- sundries and small equipment.

8 Q And you say the name of the company was Amboy?

9 A Rower.

10 Q Now, what happened next in your dental career?

11 A Well, I continued as a salesman, and the company
12 grew in size, and I was more or less managing the store. I
13 was sales manager, manager, along with the boss at that time,
14 and in 1957 the boss sold me half of his company, and I
15 became a part owner.

16 Q And he retained the other half?

17 A He retained the other half.

18 Q And eventually did he sell the second half of his
19 business?

20 A Yes. About 1961 he sold the second half of his
21 business.

22 Q To whom?

23 A To myself, and I brought my brother in.

24 Q So in about 1967 you owned the business?

25 A No. 1961.

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1 JGP 11 Cyker - direct
2 Q You and your brother owned Rower?
3 A Owned Rower, yes.
4 Q What is the full name? Is it Rower Dental Supply
5 Company?
6 A Yes.
7 Q And its headquarters are in Boston?
8 A Yes. Boston, Massachusetts.
9 Q At the time you purchased the Rower Dental Supply
10 Company, what were its total sales, if you know, approximate-
11 ly?
12 A I would say about three, four hundred thousand
13 dollars. I am talking about -- yes, three, four hundred
14 thousand dollars. Then, in '61, could have been seven,
15 eight hundred thousand, maybe a little more. I can't give
16 you the exact figures, you know, by the year at this point.
17 Q Approximately?
18 A Yes.
19 Q And how many salesmen did Rower Dental Supply
20 Company employ?
21 A When?
22 Q At that time, at the time you purchased it.
23 A I think it was myself and another salesman.
24 Q Did Rower at that time have all the lines that are
25 usually sold?

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1 JGP 12 Cyker - direct

2 A No. We just had a limited amount of lines. We
3 did not have the major lines.

4 Q What do you mean by the major lines?

5 A Well, the major lines is companies like General
6 Electric made one of the best x-ray machines. Ritter made
7 all equipment for dentists and was a leading line.

8 Q Heavy equipment?

9 A Heavy equipment and small equipment.

10 Q Did you have those lines or not?

11 A No. And then L. D. Caulk Dental Supply Inter-
12 national, S. S. White, which is part of Penwalt Corporation.

13 Q Did you eventually expand the Rower business into
14 other areas?

15 A Yes. The company grew quite rapidly, and by 1965
16 we opened up a store twenty-five miles out of Boston --
17 Worcester, and we opened up a store in Providence, which is
18 about thirty-five, thirty or thirty-five miles from Boston.
19 Our salesmen used to complain that you couldn't service that
20 particular market out of Boston effectively.

21 Q So it was necessary to locate salesmen in those
22 towns?

23 A Yes.

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MMP 1

Cyker - direct

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Q Now, in 1968 did you have an opportunity to enter in the New York market?

A Yes. There was a decree against Penwalt. They were the largest dental equipment and supply manufacturer and also one of the largest distributing chain operations in the country.

Q What was the trade name of Penwalt?

A S. S. White. They had, I believe, somewhere close to forty stores, and the Government made some kind of a deal with S. S. White in which S. S. White agreed to divest themselves of \$7,000,000 or \$8,000,000 worth of sales in the retail business, and S. S. White let it be known, they picked, I believe, four dogs in the industry, in New York, Philadelphia, Washington and Omaha, Nebraska, and put them on the market for sale.

Q When did it come to your attention that they were for sale?

A I would say the beginning of '68, or it could be the end of '67.

Q Did you start negotiations for the purchase of the stores in New York?

A Yes, in New York.

Q The S. S. White stores in New York?

A The S. S. White stores in New York. They called

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1 MMP 2 Cyker - direct

2 them stores, but to understand it correctly, there was a
3 store on 42nd Street, which was a complete, full-line store,
4 but they had an outlet, a service outlet in the Bronx and
5 one in Brooklyn, in which they had a contract to service the
6 local laboratories, and the reason for this, many years ago,
7 S. S. White bought that store from a dental supply, a tooth
8 manufacturer, and they had more or less a moral obligation
9 to keep the image that they are giving service on teeth in
10 those areas.

11 THE COURT: I am sorry, but we have to interrupt
12 now. I think you can just keep your places.

13 (Recess,during which another matter was heard.)

14 BY MR. JINKINSON: (Continued)

15 Q Mr. Cyker, you entered into a contract, did you
16 not, with Penwalt or S. S. White to purchase the three
17 stores in New York?

18 A I think we came to an understanding some time in
19 1968 that we are going to purchase it. They agreed to sell.
20 There were some formalities that had to be done in between,
21 which the lawyer took care of.

22 Q The Government had to be notified of your purchase?

23 A No. I guess the lawyer from Penwalt requested some
24 kind of statement, some information.

25 Q So you were to take over the S. S. White stores on

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1 MMP 3 Cyker - direct

2 what date?

3 A On January 1, 1969.

4 Q Did you actually take them over on that date?

5 A Well, theoretically. In practice, we started to
6 operate January 1st, 1969, at S. S. White, but it closed in
7 April. When we went in in January and started operation,
8 the balance sheets and the statements were presented to us,
9 and we looked at the inventory, and being an old company, we
10 found in the warehouse some discrepancies. So it took us a
11 little time to straighten this thing out. In fact, the
12 final adjustments were not made until 1972.

13 Q Is that right?

14 A Yes; it is a big company, and it kept dragging on
15 and on.

16 Q What were the reasons you wanted to acquire S. S.
17 White?

18 A Well, I had a two-fold reason.

19 THE COURT: Don't go too fast, because we want the
20 reporter to get this down accurately. We are making a
21 written record of everything.

22 A (Continuing) Well, we had a two-fold reason: one,
23 that this will enable me to get all the lines that I did not
24 have, that we did not have in Boston.

25 Q That is Rower?

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1 MMP 4 Cyker - direct

2 A Rower. Secondly, I felt I was well known in
3 Massachusetts; New York being a huge market would give us
4 an opportunity to enter the New York market with a company
5 that had been in business for so many years.

6 Q At the time you took over the operation and finally
7 closed on April 19, 1969, did something happen to Rower
8 Dental?

9 A Yes. I was approached by a company to merge or
10 sell my company to them in '69.

11 Q That was Healthcare at that time?

12 A At that time it was called Healthcare. They were
13 putting together a national health company; they were in
14 nursing homes, and that was the years of mergers and acqui-
15 sitions.

16 Q So you sold the company?

17 A To Healthcare.

18 Q Did you subsequently become known as Healthco?

19 A Yes.

20 Q The present company?

21 A Yes. I was not the president, to start with.

22 THE COURT: You were not?

23 THE WITNESS: Not the president of Healthcare to
24 start with, at that time.

25 THE COURT: I understand. So you sold the company
486a

1 MMP 5 Cyker - direct
2 to Healthcare?

3 THE WITNESS: Healthcare.

4 THE COURT: Rower became a subsidiary of Healthcare?

5 THE WITNESS: Yes, the business.

6 THE COURT: I suppose you got stock in Healthcare?

7 THE WITNESS: I have stock in Healthcare.

8 THE COURT: Was Healthcare a publicly held company?

9 THE WITNESS: No; it's not public today, either.

10 THE COURT: It is not?

11 THE WITNESS: No.

12 Q You continued to operate Rower, however?

13 A Yes; I continued to operate Rower in Boston and
14 Rower in New York, which is S. S. White. Part of the agree-
15 ment of S. S. White was we could not use the S. S. White name.
16 We had to change the name to Rower.

17 Q You subsequently became president of Healthco?

18 A I became president of Healthco, the end of '69.

19 Q You are still president of Healthco?

20 A In addition, they gave me the title last year of
21 chief executive officer.

22 Q When you acquired S. S. White, did you acquire any
23 salesmen?

24 A Well, that is what I thought I did. I thought I
25 acquired a company with twenty salesmen.

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1 MMP 6 Cyker - direct

2 THE COURT: With how many?

3 THE WITNESS: Twenty.

4 Q You say you thought you did?

5 A Yes.

6 Q What makes you make that statement, that qualified
7 statement?

8 A When I went into the store in January of '69 and
9 started to operate, some of the salesmen were seventy-eight,
10 eighty-three, some young ones. I took the list, the employ-
11 ment records. They used to come and go. They come in for
12 three months, disappear, and here they are supposed to be
13 doing \$1,800,000 a year in sales, but they were diminishing
14 because White, being an international company, more or less
15 kept this outlet in New York for people that came from out of
16 the city, you know, as a connection, a communication point
17 for them. They also were in other businesses than dental.

18 By April I think we lost more than half of the
19 salesmen.

20 The management was quite old. Some of them went
21 back to White, to their other branches. It was a very
22 poorly run company. And, finally, S. S. White sent in people
23 to take inventories. It was a company that didn't make any
24 profits. In fact, it had losses. But S. S. White fairly
25 recognized those things, they saw it, and they made some

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1 MMP 7 Cyker - direct

2 adjustments, we made some adjustments.

3 I started coming down three days a week, and my
4 brother started coming down three days a week, trying to look
5 for solutions for making it a viable company.

6 THE COURT: How many salesmen of the twenty did you
7 wind up with?

8 THE WITNESS: I would say right now no more than
9 four.

10 THE COURT: Four? The other sixteen have left --

11 THE WITNESS: Retired --

2 12 THE COURT: Retired for age?

13 THE WITNESS: Or they were not actually what you
14 would call established salesmen; they were trainees; they
15 didn't like the business, and New York is very difficult to
16 control, to continue checking them, and I wound up with
17 almost no salesmen.

18 Q Did S. S. White keep a record of profits and losses
19 by stores?

20 A Yes.

21 THE COURT: Did it turn out that the New York
22 stores had been showing losses?

23 THE WITNESS: Yes.

24 THE COURT: I suppose that is why they agreed to
25 sell them as part of their deal with the Government?

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1 MMP 8

Cyker - direct

2 THE WITNESS: The new York, Washington, Omaha.
3 Some of my friends bought the other stores. They had the
4 same problems. They all showed losses.

5 Q Now, subsequently, did you make an acquisition of
6 National Dental Supply?

7 A If you can call it a dental supply. They were in
8 the same building as S. S. White, and there was a salesman
9 by the name of Vince Petrullo, and a fellow by the name of
10 George Rose. And they told me they have just left General
11 because General is going downhill, and Mr. Katz, I believe,
12 or Mrs. Katz died. They had a small, little supply house,
13 no bigger than this room. They tried to make a go on their
14 own, and they had been salesmen all their lives, and things
15 are difficult, and so I said, "I need salesmen. Why don't
16 you come to work for us?"

17 And they had about thirty thousand dollars worth
18 of stock, and they owed some bills, and they thought it was
19 a good idea, and I just brought them in there, and they had
20 a good merchandise man, a man who could talk on the telephone
21 when doctors called. It is a business where you have to be
22 knowledgeable to take in orders and fill orders properly.

23 Q The total sales were about how much a year?

24 A I think their sales were around 200,000, and I
25 don't know how much we kept, because these doctors were loyal

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1 MMP 9 Cyker - direct

2 to Mr. and Mrs. Katz for many years. It was like a family,
3 husband-and-wife type of deal.

4 THE COURT: Who are Mr. and Mrs. Katz?

5 THE WITNESS: The people who owned National.

6 THE COURT: Mr. and Mrs. Katz owned National?

7 THE WITNESS: They passed away. These two salesmen
8 bought it from, I think you would call it the --

9 Q The administrator or trustee?

10 A Yes, or trustee, whoever it was.

11 THE COURT: Two salesmen from General Supply
12 Company wanted to go out on their own, so they left General
13 and bought from the estate of Mr. and Mrs. Katz National
14 Dental Supply Company, which was on the same floor --

15 THE WITNESS: In the same building --

16 THE COURT: -- as Rower? And these two ex-salesmen,
17 whom you thought were very good, and maybe they were better
18 salesmen than they were as inside people --

19 THE WITNESS: They were better.

20 THE COURT: You needed salesmen in Rower, so for
21 that reason you took over the National?

22 THE WITNESS: They invited me to the store, and
23 they really could not even read a balance sheet, and they
24 were all mixed up, so I said, "Would you come and work as
25 salesmen?" They said, "Yes. Would you pay off the bills?"

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1 MMP 10 Cyker - direct

2 It was about a \$30,000 transaction. That is all.

3 Q You paid off the bills?

4 A And they moved the staff upstairs.

5 Q You paid --

6 THE COURT: You paid for the inventory, and they
7 went to work for you?

8 THE WITNESS: Yes.

9 Q And by that deal you got two salesmen?

10 A Yes.

11 Q And they are still working for you?

12 A No, just one. Mr. Petrullo left, two years later.

13 At that time, he was seventy-three, seventy-four.

14 Q Was that in '69?

15 A Between February and May, February and April some
16 time.

17 Q Subsequently you made an acquisition of General
18 Dental?

19 A Yes.

20 Q Where was that located?

21 A General Dental was located in Union Square.

22 Q Can you tell me whether or not you had any intention
23 to buy General Dental?

24 A Well, General Dental had been in trouble. They
25 went into receivership in 1961 --

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1 MMP 11 Cyker - direct

2 MR. SIRIGNANO: I object. I move that the answer
3 be stricken unless some foundation is laid for this witness'
4 personal knowledge of what happened prior to his acquiring
5 General Dental.

6 THE COURT: If there is any doubt about it, I will
7 allow you to cross-examine him to the contrary. I will take
8 it.

9 Q Were you approached at any time, or at one time
10 by anyone from General Dental to buy them?

11 A Yes: off and on.

12 Q What time? Do you say in 1961?

13 A From '61, '62, on and off. General Dental was
14 owned by a trusteeship.

15 Q For the benefit of creditors?

16 A For the benefit of creditors, and the son of the
17 ex-owner, the son of the founder, he wanted to sell, to bail
18 out, and the creditors didn't want to sell, because they had
19 all the lines, and I was a different kind of dealer -- I don't
20 know the purpose or the reason -- we just couldn't come to-
21 gether. I don't know. It was just conversation, basically,
22 at the time, and nothing happened.

23 Q Until about 1969? Is that right?

24 A Until about 1969. I think they approached us even
25 during '68. I think -- Well, I know, not I think, that two

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1 MMP 12 Cyker - direct

2 of the employees of General made a deal with the trustees,
3 and they bought the company, but the trustees, the creditors,
4 forgave fifty per cent of the money owed to them, and they
5 acquired General.

6 Q Do you know their names?

7 A Mr. Singer and Mr. Richman, and they ran into
8 financial problems, because in 1968, I think the end of that
9 year, I think they had to come up with the money or be put
10 out of business. And they called us and asked if we would
11 want to buy them, and I really didn't need them, because I
12 already bought S. S. White.

13 Q You finally acquired General some time in 1969?

14 A Yes.

15 Q About May?

16 A Of '69.

17 Q How many salesmen did you acquire from General?

18 A Sixteen -- fourteen. I am sorry. Fourteen sales-
19 men.

20 Q Are they all working for you now?

21 A Not really. Out of the twenty from S. S. White, two
22 from National, fourteen from General, thirty-six, we now have
23 only twenty left.

24 Q Do you know about what sales volume General had at
25 the time of the purchase?

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1 MMP 13 Cyker - direct

2 A About two and a half million dollars. That was one
3 of their highest years. It was a good welfare year.

4 Q Did General also have a problem of selling out
5 for the purpose of taking advantage of tax losses that had
6 accumulated over the years?

7 A Something like that. I don't know the exact
8 details of it, but it had something to do with it.

9 Q I assume that Mr. Singer and Mr. Richman went with
10 you.

11 A Yes. Mr. Singer was a very good administrator.

12 Q Did you consolidate General with Rower?

13 A Yes. We put the two together.

14 THE COURT: Did you give up the Union Square store?

15 THE WITNESS: Yes.

16 THE COURT: And so after you acquired General,
17 all the operations were from the 42nd Street store of Rower?

18 THE WITNESS: Not to start with, your Honor. To
19 start with, we kept the 42nd Street store. We were selling
20 just to laboratories, because there are many labs in that
21 section. We kept Union Square for the doctors' business.
22 We were forced to close in the Bronx and in Brooklyn because
23 there was not enough business. We had a lot of problems with
24 the help, the same kind of problems we see today, and they
25 were in bad sections. We had break-ins; we didn't really

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1 need them. Nobody would want to work there and make deliver-
2 ies. So we closed the Bronx and Brooklyn.

3 Q That is, the S. S. White stores?

4 A Yes, sir, and we operated the dental supply busi-
5 ness from Union Square for the dentists, and for the
6 laboratories we operated that business from 42nd Street.

7 THE COURT: Under the name of Rower?

8 THE WITNESS: Under the name of Rower. And a
9 year later, about a year and a half, '71, for economic
10 reasons, the store we had at 42nd Street and Seventh Avenue
11 was moved to 44th Street, which was a better location, on
12 the street floor. That is not far from Times Square. We
13 put the two places together.

14 THE COURT: So eventually, in 1971, the old S. S.
15 White 42nd Street and the old General Union Square place
16 were put together in 44th Street?

17 THE WITNESS: That is right.

18 THE COURT: And I take it that is where they are
19 now?

20 THE WITNESS: Yes.

21 THE COURT: I understand.

22 Q Now, what area of the New York market did General
23 operate in, if you know?

24 A Well, they operated in the New York area, but, you

25 496a

1 see, the dental market is a little funny. Dentists from New
2 York, that open up in New York and then decide to move to,
3 let's say, Long Island, sometimes they have a loyalty to the
4 salesmen; so General would operate mainly in Manhattan,
5 Brooklyn and probably have a salesman going out to the Island
6 and maybe a salesman going out to Staten Island. But this is
7 about the area they operated in. They may have had an isolated
8 customer here and there in New Jersey or something.
9

10 Q Did you subsequently make an acquisition of the
11 Schechter store?

12 A Yes.

13 Q That was about June of 1969?

14 A Yes.

15 Q Give the Court a description of the Schechter
16 business as you found it and noted it.

17 MR. SIRIGNANO: Objection.

18 THE COURT: I will permit it. Overruled.

19 A Schechter was owned by a Mr. Stone and a Mr.
20 Schechter. Mr. Stone was a younger man. Mr. Schechter was
21 not a well man. He had Parkinson's disease, and they had a
22 good store in Hackensack, New Jersey, covering the New Jersey
23 market. Mr. Schechter had also what we call a college store
24 across from Columbia University Dental School. For many
25 years he used to service the University and the students at

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1
2 Columbia.

3 Q Did you subsequently close the Columbia store?

4 A Yes. We felt we could give better service because
5 we already had a store in New York, rather than have a small,
6 little store across from the school, and the school had put
7 in some new equipment, and it was not necessary to be just
8 across the street, from a service point of view.

9 Q Do you recall the volume of business that Schechter
10 did at the time you bought them?

11 A Oh, a million-six, a million-seven.

12 Q How many salesmen did Schechter have?

13 A About eight salesmen.

14 Q Primarily, their business was in New Jersey?

15 A That is right.

16 Q Had you been serving New Jersey out of the Rower
17 store in downtown Manhattan?

18 A Not really.

19 Q Did you send any salesmen out there?

20 A I am not sure. You can't really answer this, be-
21 cause if a salesman did have a friend there, he would
22 probably see him or call him on the phone. I can't really
23 say.

24 Q Regularly, you were not going into New Jersey from
25 the downtown Rower store?

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1 MMP
2 A I don't think so.

3 Q And Schechter was selling a small amount in Manhattan,
4 around Columbia University?

5 A Yes. Columbia graduates would open in Manhattan,
6 and they would buy from him.

7 Q Do you know how the discussions, the talks were
8 initiated that led to your acquisition of Schechter?

9 A Well, frankly, I met Freddy --

10 THE COURT: Who is Freddy?

11 THE WITNESS: The owner, in New York. We went
12 out to a coffee shop for lunch. He said, "You know, Mr.
13 Schechter is getting old. I am fifty years old. I am a good
14 salesman. You don't know the city. This is a big jungle.
15 You will live longer if you get a guy like me in your
16 company, and at the same time you will have someone to
17 service the New Jersey market."

18 So I made a deal with him right in the restaurant.
19 He brought me a statement and his lawyer.

20 Q What were the reasons you made the acquisition of
21 Schechter, if you had any reason?

22 A Well, I mean, it's a new market. Part of this
23 industry in general, the dental, medical field, delivers to
24 the patients and has become a big subject in this country.
25 We are living in the richest country in the world, with the

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poorest delivery service in the world to the average individual. So there was big talk, and the societies are working towards generally not only improving the services to the public, but also somebody has to service the people who give the service.

There was a national expansion program going on by many companies, large, big companies, like Syntex and D. G. Searle and Eli Lilly, and North American-Phillips, huge, million-dollar companies, who are entering the dental field, because even today we feel there is going to be a great need for dentistry all over the world, not only in this country. You have countries today that have three dentists in a population of twenty million people.

Q Now, subsequently, in November of 1969, did you make acquisition of the Hebard business?

A Yes.

Q Will you give a description of the Hebard business? Where is it located?

A I used to come to New York, and we sent a service man out to the Island, and he would not come back until the next day to make a service call. You know, I didn't know New York that well, but, you know, when you take a look, the Island is like another country, and I wanted to enter that market, and at that time there was a company available,

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MMP Cyker - direct 555

Hebard Metro. They had originally left, many years ago --

It was a cousin of Mr. Gutterman that worked for Gutterman for many years, and when the father passed away, apparently the cousin didn't keep his promise; he picked himself up with five salesmen and opened a store on the Island.

Q Did he take any salesmen from Gutterman?

A He almost ruined him. He took his best salesmen away.

Q And he went out to the Island?

A Yes.

Q He started a business?

A Yes, because he was asking Mr. Gutterman to keep his death promise, to have some kind of pension plans for the salesmen and also sell him some of the business. It is a family dispute. There are two sides to this, so I don't know.

Q You found it was difficult for you downtown on 42nd Street to service the Island?

A And, frankly, when I got in New York, I kind of overestimated myself. I figured I can just do it myself. I needed people that lived in this city. It is like a different country to me. Even the dentists are not exactly the same. There is a different way you have to talk, a different way of doing business, and Mr. Kalik was supposed to be known as the best manager in the industry, and I felt that

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MMP Cyker - direct

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this will give us a new market in Syosset, and also a potential for having to bring a man some day to run the Healthco region or Healthco help in the main office.

And I did move him to Boston eventually, to help me out.

THE COURT: Who is this Mr. Kalik -- K-a-l-i-k?

THE WITNESS: Yes.

Q Where was Kalik?

A Kalik left Gutterman five years ago and took some of his best salesmen. He was a cousin.

THE COURT: He is a man who was the cousin of Gutterman?

THE WITNESS: Yes; he went to the Island.

THE COURT: His name is Kalik?

THE WITNESS: Yes.

THE COURT: And Kalik was supposed to be a good manager?

THE WITNESS: One of the best.

THE COURT: So your hope was, as I understand your testimony, that by getting this Hebard Metro you would get, among other things, Kalik?

THE WITNESS: Kalik.

THE COURT: And Kalik could be the manager of the Rower operation in New York?

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THE WITNESS: The operation in New York, or even help us out in Boston, the main office.

THE COURT: Tell me, when you acquired S. S. White, did you get a good manager like Kalik?

THE WITNESS: Zero.

THE COURT: When you acquired General, did you get a good manager like Kalik?

THE WITNESS: I got a good administrator.

THE COURT: A good administrator?

THE WITNESS: But he was also not a New Yorker; he was a fellow from Chicago, who had been in New York ten years, running the trusteeship.

THE COURT: What was his name?

THE WITNESS: Singer. But he didn't grow up in the business like Kalik. Kalik grew up in the business in the Bronx.

THE COURT: When you acquired National, did you get a good manager?

THE WITNESS: No. Two salesmen, one seventy-two years old and one fifty-eight years old.

THE COURT: Now I am caught up. All right, Mr. Jenkinson.

Q In addition, you got what you considered an entree into a new market?

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A Completely new market, all the Long Island market.

Q Is there presently out there any competition on the Island?

A Oh, yes.

Q Who is operating out there?

A You got Central Dental operating, which is a part of the Daylin Corporation.

Q Anybody else?

A Well, you have a lot of small companies.

Q You have no principal competitor?

A Everybody is a principal competitor; everybody sells equipment.

Q No large competitor like Central?

A I was the smallest company, with ten of the biggest competitors. I was the worst competitor. How can you define large or small competitor?

Q Are they building a new dental school out on the Island?

A There is a new school going in New York. I don't know exactly the city, but it is a brand-new dental school. There is a new dental school going up in New Jersey.

Q How many salesmen did you get when you acquired the Hebard Metro?

A Hebard Metro? I believe there were four salesmen

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or so.

Q Four or six?

A Four or six. Don't hold me.

Q Six sounds better?

A It could sound better, yes.

Q Do you know the volume of business that Hebard Metro is doing?

A I believe about a million-eight, a million-seven, something like that.

Q Did Hebard Metro have a connection with Hebard?

A Yes; they have a connection with Hebard in White Plains, which covers the White Plains market, Westchester and also all the way down to Poughkeepsie.

THE COURT: All the way up to Poughkeepsie.

THE WITNESS: All the way up to Poughkeepsie.

Q Were they operating in the same territory?

A No; I don't think so, because Long Island and White Plains are two different markets. They had some inter-connection. It was like one company, more or less.

Q Of the six Hebard Metro salesmen you got, how many are still working for you?

A I believe most of them are still with us, maybe with the exception of one. I am not sure.

THE COURT: I have to say that I don't understand

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Cyker - direct

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the two Hebard acquisitions. The witness is not a lawyer, I take it. He says they were one company, more or less, and that expression to me does not mean a thing.

MR. JINKINSON: I was just going to ask about that.

Q I want you to explain what you mean by that "more or less".

A I have to explain it to you because it is not really a normal, routine business. When Kalik left Gutterman with the five salesmen, in order to maintain the lines, he had to have a connection with a company that held all the lines. The people at White Plains years ago also used to work for Gutterman. They started together; they were friends of Kalik. They originally came from Gutterman and left Gutterman maybe twenty years ago. So in order to maintain the lines, they had some kind of phony merger -- I don't understand it myself -- it looked like one company, like one owned forty or sixty per cent of the other. I never understood it.

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Q And they also lent the name of Hebard?

A Yes. They lent the name of Hebard to Metro. This was Hebard Metro Dental Supply.

THE COURT: Did you buy them both at the same time?

THE WITNESS: Yes.

THE COURT: I see. They were at least so much affiliated that you could not buy one of them without the other?

THE WITNESS: I could not buy it from this point of view, and then morally they said they just couldn't do it. They said morally they could not part.

THE COURT: Because they had worked closely together?

THE WITNESS: Together, yes.

THE COURT: And had been friends for a long time, because they all started at Gutterman?

THE WITNESS: That's right.

THE COURT: So one of them said, "It wouldn't be fair to our affiliated group up in Westchester if we left them"?

THE WITNESS: Left them. That's right. Something --

THE COURT: And if you tried to buy Westchester, do you suppose they would have said the same thing?

THE WITNESS: The same thing. They were four partners. They always used to come together. None of them used to come alone.

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2 Q You also at the same time got Hebard. They were
3 up in White Plains, in Westchester County?

4 A Yes; yes.

5 THE COURT: You mean Hebard White Plains and
6 Hebard Long Island, the principals, all came to see you at
7 the same time?

8 THE WITNESS: That's right.

9 THE COURT: So you were dealing with both groups?

10 THE WITNESS: With both groups.

11 THE COURT: At the same time?

12 THE WITNESS: Yes.

13 THE COURT: All right.

14 THE WITNESS: In fact, they divided the pie equally,
15 you know.

16 Q Did they approach you?

17 A You know, it is difficult for me to say, did they
18 approach me or did I approach them. You know, you meet at
19 conventions, and you start a conversation, and you discuss,
20 you know, and you say you got problems. They say, "I can
21 help you with the problems. Are you willing?" You know --
22 this kind. I can't really say.

23 Q At the time of the acquisitions around November
24 1969, was Rower Dental Supply Company doing any extensive
25 business in dental supplies in the Westchester, White Plains,

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JGP Cyker - direct

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area?

A Very little. Almost -- almost negligible.

Q For what reason?

A Well, it is difficult to service that market from New York, and we just did not have enough people. The dentists in this industry like prefer to deal with a local guy when it comes to service, which you got two kinds of service: one, you service equipment. If a compressor breaks down, a bulb burns out, a syringe blows out. So they deal with a guy that's been there for years and was established and dependent on them.

Q About how far is it from your store down on 44th Street to White Plains, New York, in miles? Do you know?

A About fifty miles, forty miles.

Q How far is it from your store downtown out to Westbury, Long Island?

A I think the same thing. I took a ride. Took a long time to get there.

Q What were the sales of Hebard, if you know?

A About the same as that, about a million-seven, a million-eight, a million-six.

Q That was Hebard Metro, one million-seven?

A Yes.

Q Hebard was about 1,100,000?

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2 A One million dollars or something.

3 Q What was your reason for the acquisition of
4 Hebard?

5 A You mean in White Plains?

6 Q Yes.

7 A There are two Hebards.

8 Q Sir?

9 A The reason for the two of them or just the one in
10 White Plains? I mean, I had to take the two, to start with.

11 Q All right. You can take both of them. I thought
12 you explained about Hebard Metro. You can take them both
13 at the same time.

14 A Well, I entered two complete new markets.

15 Q How many salesmen did you get when you acquired
16 Hebard alone?

17 A I really don't remember.

18 Q About five?

19 A It sounds right. About five.

20 Q And between Hebard Metro and Hebard, you got about
21 eleven salesmen in the acquisition?

22 A I would say so.

23 Q And how many are still working for you?

24 A I know one of the principals, the man who got
25 his money, took off, so we lost him. And I don't remember

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2 who else we lost.

3 THE COURT: Did you continue those stores in opera-
4 tion?

5 THE WITNESS: Yes.

6 THE COURT: And are they still operating?

7 THE WITNESS: Yes.

8 THE COURT: Rower is in White Plains?

9 THE WITNESS: The same place; the same location.

10 THE COURT: And Rower is in Westbury?

11 THE WITNESS: Yes. Syosset. Is that called
12 Westbury?

13 THE COURT: It is Syosset instead of Westbury?

14 THE WITNESS: Yes. Syosset.

15 THE COURT: All right.

16 Q Mr. Cyker, do you recall the sales of the Rower
17 Dental Supply Company, the Sechter Company, the Hebard Metro
18 and Hebard Company for the years 1970, '71 and '72?

19 A I believe in '70 was a little over \$10,000,000.

20 Q Let me hand you a tabulation. Are these the
21 correct figures of the sales of those companies?

22 A 1970 was \$10,306,000 for the combined operation.
23 1971 went down to \$9,482,000, and 1972 we went up to
24 \$11,158,000.

25 Q Do you have any explanation for the drop in sales

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2 between 1970 and 1971?

3 MR. SIRIGNANO: I would like to get this clarified.
4 These are total sales or sales just within the Metropolitan
5 New York area?

6 MR. JINKINSON: These are total sales of the
7 Metropolitan New York area.

8 MR. SIRIGNANO: Then they are not total sales.
9 Then those figures are not total sales. There were extensive
10 sales. There were at least some sales outside the Metropoli-
11 tan Area which don't appear reflected in those figures.

12 THE WITNESS: Do you mean, sir, that --

13 MR. JINKINSON: I am informed, Mr. Sirignano, that
14 those figures that he is reading here are the figures re-
15 turned in the answers to the interrogatories.

16 MR. SIRIGNANO: Those answers are only within the
17 Metropolitan New York area. As I understand it, there are
18 sales which are not in the Metropolitan New York area, and
19 there are sales to "others" made by these which are not in-
20 cluded, so that these do not represent the total sales of
21 those companies.

22 MR. JINKINSON: These are the sales, then, within
23 the New York Metropolitan area.

24 MR. SIRIGNANO: To dentists, dental laboratories,
25 institutions and agencies. It by no means represents the

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1 total sales.

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3 MR. JINKINSON: These sales represent the sales by
4 these companies within the New York Metropolitan area,
5 which is the area designated in the complaint.

6 MR. SIRIGNANO: That is correct. And I must also
7 qualify that by reference to the classes of customers
8 specified.

9 MR. JINKINSON: They are to dentists, laboratories
10 and institutions; right?

11 MR. SIRIGNANO: Correct.

12 THE COURT: And they are taken from answers of the
13 defendant to certain interrogatories by the Government?

14 MR. SIRIGNANO: Yes, your Honor.

15 MR. JINKINSON: Yes, your Honor; correct.

16 BY MR. JINKINSON:

17 Q And in 1971, what were the total sales?

18 A \$9,482,000.

19 Q And in '72?

20 A \$11,158,000.

21 Q Now, I note that there are lower sales in '71 than
22 in '70. Can you explain that in any way?

23 A Well, it was a transition; the loss of salesmen
24 and, on top of it, very extensive competition. You know,
25 the competition got much stronger. Some of the smaller

dealers got much bigger. Mail order houses entered the New York market very extensively. Direct sales from manufacturers were expanded. Imports from Japan and Europe were increased.

Q Did your salesmen meet resistance from dentists because of the fact of this lawsuit?

A I don't -- I did not want to say this, but one of the biggest problems we had is a rumor was created by our competitor that the Government is putting us out of business. The dentists were resisting buying equipment from us, because they would not get service or back-up.

We had difficulties getting help. We lost some of our help to our competitors, some salesmen, because of these rumors that we were not going to be in business very long.

Q When a dentist buys what we call a heavy piece of equipment --

A A capital piece of equipment, capital equipment, you know.

Q -- a chair, a unit, he expects it to last a long time, and he wants service for a long time?

A Yes. He would not like to buy from a company that is going to be out of business next week.

Q All right. You had substantial increases in 1972. Was that because of increased unit sales or inflation or what?

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Cyker - direct

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A Wait. You have to remember, from 1970 to 1972 we had devaluation, which automatically increased the cost of goods. We had inflation. Precious metals went up three hundred per cent in prices. And so basically I think this would account mostly for inflationary reasons.

Now, in '72 over '71, some of it would be because we might have gained some of our customers back; but it is not -- it is not significant in unit sales.

THE COURT: Because we have continued to have inflation; prices have gone up?

THE WITNESS: I precious metals especially, it tripled in price.

Q Mr. Cyker, I am going to now refer you to some of the testimony of Dr. David Schwartzman, who appeared as a witness, an expert witness in behalf of the plaintiff in this case. I direct your attention to page 372 of the transcript, at line 19.

Dr. Schwartzman testified:

"Now, the services that the dental dealers supplied included the maintenance of stock of sundries, so that they provided the dentists with a selection of items. This included providing information to dentists about what was available in the way of equipment and in the way of sundries."

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Now, does anyone else have that service except you?

A Well, this service is usually initiated by the manufacturers, to start with, by direct mail to each customer, by putting on clinics in each city by the manufacturers, by introducing the products to the universities, by having -- we have about 750 conventions, you know, state conventions, city conventions, more conventions than any other industry, because a lot of political groups in dentistry, this society and that society, in study clubs.

So most of the new products are introduced through the manufacturer's direct involvement with the consumer.

Q But do competitors have any disadvantage because of this, or do you have any advantages?

A I think, frankly, we don't have an advantage. We don't have a disadvantage. If we have a disadvantage, because of negligence of certain salesmen about keeping up to date -- but I don't see any advantage that we have over our competitors, you know.

Q He further testified, at line 2 of page 373, as follows:

"They advised the dentist concerning the type of equipment he might want, advised him concerning the layout of his office, and they also provided repair service on the equipment."

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2 Now, is your type of dealership the only place
3 where these services might be obtained?

4 MR. SIRIGNANO: Objection, your Honor. This is a
5 form of leading, whether or not the question is specifically
6 stated in a leading form.

7 If ever a type of question was made to suggest its
8 answer, this is the kind of question Mr. Jinkinson is
9 presently asking.

10 THE COURT: I will permit it. Overruled.

11 A Would you repeat this again, please?

12 Q The doctor testified:

13 "They" -- the dental dealers -- "advised the
14 dentist concerning the type of equipment he might want,
15 advised him concerning the layout of his office, and they
16 also provided repair service on the equipment."

17 A Well --

18 THE COURT: Wait. What is the question?

19 Q My question is: could those kinds of services be
20 secured anywhere else other than from companies like yours?

21 A These services are supposed to be supplied by
22 everybody in the dental industry, every one. But advised
23 dentists to buy equipment? Years ago you could. With the
24 new generation, the last five, six years, you can give very
25 little advice. They come; they know what they want. They

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1 seen in a convention, and that's what they want. And you
2 get this information from not only our competitors; you get
3 it from mail order houses; you get it from manufacturers;
4 you got plans from -- in the dental survey magazines. And
5 it's available anywhere. We are not unique in this.

6
7 Q There are repair services in New York that do
8 nothing but repair dental equipment?

9 A Yes. Service companies in the New York area that
10 specialize in servicing small equipment, service companies
11 specializing in fixing all kinds of old equipment, even up-
12 dated equipment and up-to-date equipment. It is companies
13 that condition old equipment.

14 You got many different varieties of service dental
15 companies in New York.

16 THE COURT: You mean unconnected with dental
17 dealers?

18 THE WITNESS: Unconnected with dental dealers.
19 They start with the dealer. In other words, a couple of my
20 servicemen would leave me and go on their own.

21 THE COURT: And they are unconnected with manu-
22 facturers?

23 THE WITNESS: Yes.

24 THE COURT: They are an independent business enter-
25 prise?

1 THE WITNESS: Enterprise.

2 THE COURT: For servicing dental units?

3 THE WITNESS: Dental units. They might be connected
4 with some manufacturers who manufacture parts, you know.
5 Some of them connected with manufacturers of small equipment.

6 THE COURT: But if I am a dentist, I can simply
7 call up these service companies --

8 THE WITNESS: And they will come to your office.

9 THE COURT: -- and they will fix my equipment in
10 the same way that I call up a TV repairman --

11 THE WITNESS: Yes, sir.

12 THE COURT: -- to come and fix my TV?

13 THE WITNESS: Yes, sir.

14 THE COURT: All right.

15 Q Now, Dr. Schwartzman continues, at page 373, at
16 line 6:

17 "They" -- the dental dealers -- "provided, in
18 addition to that, quick delivery, which seems to be
19 of some importance to dentists "

20 He wasn't sure about that, but he said, "It seems
21 to be."

22 Is your place the only place you can get quick de-
23 livery, a store of your kind?

24 A We try to make the quickest delivery we possibly
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1 can. Unfortunately, we can't even compete sometimes with the
2 mail order houses, which have huge warehouses, and they can
3 deliver much faster than we can, because we don't keep too
4 much merchandise on hand. But occasionally we would have an
5 emergency call, where a dentist, something unexpected -- he
6 has a patient on the chair and he broke something, where
7 the manager or the secretary, whoever is in the store, will
8 get in the car and make a special delivery, you know, deliver
9 him and help him out.

11 In fact, I encourage my people to do it, because
12 the dentists work in a small room, you know, they work all
13 day, and sometimes not the best businessmen in the world
14 from an organized -- having the proper part in stock, or
15 extra bulb. Many guys will call me on a Sunday, a Saturday,
16 the bulb blew out in the dental light, and they did not have
17 an extra bulb.

18 So this type of service, a dentist would call a
19 salesman home over a week end, you know. But routine mer-
20 chandise, no.

21 Q Do you have a back-order problem in operation?

22 A Oh, yes. It is one of my biggest problems: back-
23 orders. We just can't keep up, you know, keep everything
24 in stock and keep up with the new merchandise and with the
25 quantities and with the money condition, laying in inventories,

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with the high interest rates.

THE COURT: What is back-orders?

THE WITNESS: Back orders? If you would order, let's say, one box of films, one box of cotton rolls, two diamond drills, and we may run out of the size you want on the drills, or maybe we don't have the films in stock. We get it a week later or so.

THE COURT: You mean, it is an order for an item which is not in stock?

THE WITNESS: In stock. That's right.

THE COURT: And which you must order --

THE WITNESS: From manufacturer.

THE COURT: From your supplier, and get delivery to you before you can make -- before you can deliver it to the dentist?

THE WITNESS: Yes.

THE COURT: Or your customer?

THE WITNESS: And sometimes the supplier is slow.

THE COURT: All right. Suppose we take a few minutes' break here.

(Recess.)

BY MR. JINKINSON: (Continuing)

Q Now, Mr. Cyker, continuing this for two more observations from Dr. David Schwartzman, at page 373 he says:

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1 "They" -- meaning the dental dealers -- "provide
2 credit."

3
4 Now, do other people, persons selling dental supplies,
5 also provide credit?

6 A Yes. We all provide credit. Everybody in the
7 business, unfortunately, provides credit.

8 THE COURT: Now, wait. You say all the dental
9 dealers supply credit. But I take it mail order houses don't
10 supply credit.

11 THE WITNESS: Yes; they do.

12 THE COURT: They sell on credit, too?

13 THE WITNESS: Sure. They encourage it now, to
14 create their relationship with the doctor, continued rela-
15 tionship.

16 THE COURT: So the mail order house will sell on
17 credit?

18 THE WITNESS: Sure, and sometimes they give better
19 terms than we can afford to give.

20 THE COURT: All right.

21 THE WITNESS: They did not do it up until about
22 two or three years ago.

23 Q One more quote from Dr. Schwartzman, page 373,
24 line 8. He states:

25 "And, finally, they " -- the dental dealers --

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"provide the kind of personal service which they were able to do by becoming familiar through direct contact of his needs."

That is, the dentist's needs.

Did this give you a personal advantage?

A Well, you can't escape from the fact -- I mean, I don't know how much volume you can put on it -- how much value you can put on it. Is it an advantage? I don't think so. I think most dentists look at the price and if they get a better price, that's a better advantage.

Some of my best friends sell me out for the price. But naturally, if a salesman calls on a doctor for twenty years and he knows him from the day he graduates school, if he is a nice fellow and the doctor has respect for him, they do develop a personal friendship. It is a natural thing.

He might favor him with an order; he might not. It depends on the doctor's own -- how the doctor is built.

THE COURT: If I am not told any more about it than I am today, I would be bound to say that having good salesmen calling on dentists is an advantage to the dental dealer and a considerable advantage over a mail order house. Wouldn't you say so?

THE WITNESS: Yes; I would. A good salesman, not

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JGP Cyker - direct

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an order taker. A good salesman.

THE COURT: A good salesman. Of course.

Q Mr. Cyker --

THE WITNESS: He has to overcome the price difference.

THE COURT: I beg your pardon?

THE WITNESS: He has to overcome the price difference.

THE COURT: And I am sure his personality, the way, his manner of doing business has a lot to do with it.

THE WITNESS: Oh, sure. His integrity has got a lot to do with it.

THE COURT: Yes.

Q I hand you a document that has been marked as a group exhibit, Group Exhibit L, Defendant's Group Exhibit L. They have been shown to Mr. Sirignano, and he has no objection to identifying it.

Can you state what they are?

A You have three dozens of mail order catalogs come into the dentist's office every day, selling a complete line of supplies and even equipment, at much lower prices, fast delivery, good credit terms.

Q Looking at the first exhibit, which is --

A This is Veritex, which is a division of Grace,

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Grace Chemicals.

Q Does that make any reference to credit?

A Yes. They say -- let me read it.

"Free credit privilege. Veritex bills open accounts. If your credit is good in your community, it is good with us. Free freight handling within continental U.S.A. Same-day shipping. Phone in your order before two p.m., and it will be shipped to you postpaid the same day. A dollar service charge on orders of ten dollars or less. Free nationwide phone order service. Discount dental supply house. Stands alone as a free service."

Q Mr. Cyker, when you entered this market, in 1969, you had been in the market frequently, in the New York market?

A Oh, yes. I keep a close watch.

Q Keep a close watch?

A Yes.

Q On the affairs of the company in New York?

A Yes. We have a big investment in New York.

Q Let me ask this question:

What types of sellers does Healthco compete with in New York City?

A Well, we can compete with many companies of our own

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2 kind, you know, dental dealers, our basic competition. Then
3 we compete with many mail order houses. We compete with
4 manufacturers who sell direct to customers, to dentists,
5 especially to laboratories, universities, union clinics,
6 Government institutions, veteran hospitals, community
7 centers, welfare type offices, which is a doctor with
8 fifteen, twenty dentists working for him.

9 We compete with foreign market, importers, jobbers.

10 Q Lab vendors?

11 A I mentioned that.

12 THE COURT: Laboratory --

13 MR. JINKINSON: Vendors.

14 THE COURT: V-e-n-d-o-r-s?

15 MR. JINKINSON: Right.

16 THE COURT: All right. Now, tell me, did the time
17 come when you changed the name of the stores in New York from
18 Rower to Healthco?

19 THE WITNESS: Never. Not yet.

20 THE COURT: They are still Rower?

21 THE WITNESS: They are still Rower, yes.

22 THE COURT: I see.

23 THE WITNESS: We use Healthco-Rower or Rower-
24 Healthco, you know.

25 THE COURT: Well, if you look on the front door --

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1 JC? Cyker - direct 581
2 A It says "Rower Dental Supply, a Healthco Company".
3 THE COURT: And in the telephone director, what
4 would it say?
5 THE WITNESS: I am sorry to say I haven't looked
6 at it, and I don't want to guess.
7 Q Now, just a recapping of of the number of salesmen
8 you secured.
9 You secured fourteen from General, two from
10 National, twenty from S. S. White?
11 A Yes.
12 Q Right?
13 A Yes, sir.
14 Q Making a total of thirty-six?
15 A Yes.
16 Q Of that number, how many out of that group still
17 work for you?
18 A Sixteen.
19 Q You secured eight from Sechter at the time?
20 A Yes.
21 Q How many do you have now?
22 A We might have ten, eleven.
23 Q You secured six from Hebard Metro. How many do
24 you have now?
25 A I believe we probably have all of them the same.

527a

1 JGP
2 Q You have eight now?

3 A I'm not sure, but it could be eight.

4 Q And you secured five from Hebard at the time of
5 the acquisition?

6 A Yes.

7 Q How many work for you now?

8 A I would think we have five or six. You see, the
9 definition, when you get from a company the salesmen, you
10 might have five salesmen and three trainees, new fellows on
11 the road, to be salesmen. But we also identify them as
12 salesmen. They may be training to be a salesman, young
13 salesmen, just getting into the business.

14 MR. JINKINSON: You may cross-examine.

15 THE COURT: Wait just a minute.

16 Could you go back to Sechter? You asked him about
17 Sechter, and I thought, because I did not understand it
18 correctly, he said he got eight salesmen from Sechter, of
19 whom he now had ten or eleven.

20 MR. JINKINSON: He now has eleven, yes. He has
21 increased three there.

22 THE WITNESS: We hired three new ones.

23 THE COURT: Well, you mean that Rower has a
24 Hackensack store --

25 THE WITNESS: That's right.

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THE COURT: -- which used to belong to Sechter?

THE WITNESS: Yes, sir.

THE COURT: And when you bought Sechter, there were eight salesmen?

THE WITNESS: Yes, sir.

THE COURT: Working out of the Hackensack store?

THE WITNESS: Yes.

THE COURT: But now there are ten or eleven salesmen working out of the Hackensack store?

THE WITNESS: Yes. We are going deeper into New Jersey.

THE COURT: They could, all ten or all eleven, be brand-new ones. They might not have any relationship to Sechter whatever?

THE WITNESS: Could be.

MR. JINKINSON: Could be. It is a question, just a question -- the number does not, your Honor.

THE COURT: It is not how many of the eight Sechters are still employed?

MR. JINKINSON: No.

THE COURT: It is just the numbers?

MR. JINKINSON: That's right.

THE WITNESS: The numbers; that's right. Some pass away, you know, just natural death.

* * * *

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THE COURT: Defendant's Exhibit L for identification.

You have seen it?

MR. SIRIGNANO: Yes.

THE COURT: Any objection?

MR. SIRIGNANO: I object to it. Let me make sure I know exactly where I am. May I see that, please?

THE COURT: Yes.

(Pause.)

MR. SIRIGNANO: No objection, your Honor.

THE COURT: All right. Mark it.

(Defendant's Exhibit L for identification was received in evidence.)

DAVID ALLEN ELLIS, resumed:

CROSS-EXAMINATION (Continued)

BY MR. SIRIGNANO:

Q Mr. Ellis, I believe we were looking at Defendant's Exhibit B.

A I don't have that one, Mr. Sirignano.

THE COURT: Could we get Defendant's Exhibit B?

MR. JINKINSON: We have one here. We will furnish it (handing).

A (Continuing) I have it now.

Q This was the series of graphs which compared your analysis of the Metropolitan New York market, the plaintiff's

1 analysis of the Metropolitan New York market and the public
2 census figures in Defendant's Exhibit A by the Census Bureau.

3 A Yes.

4 Q I believe the question I had asked you was whether
5 the graph which covers the census figures -- I asked whether
6 that would be comparable if it contained sales outside the
7 Metropolitan New York area.

8 A Comparable to what?

9 Q Comparable to the other two, to your analysis and
10 the plaintiff's analysis. Those three graphs here.

11 A I would like to ask a question before, about
12 plaintiff's survey, if I could.
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1 MM:ar
2 Q No, no. I want an answer to my question.

3 A Well, I can tell you how I prepared it.

4 MR. JINKINSON: The witness doesn't understand
5 the quetion.

6 THE COURT: All he has to do is to say, "I don't
7 understand the question."

8 THE WITN ESS: I can tell you how I prepared the
9 graph. I don't think I can answer the question without some
10 additional information. Is that reasonable?

11 THE COURT: No, you don't have to care whether it
12 is reasonable or not. You say you can't answer the question.
13 Is that it?

14 THE WITNESS: Well, I am n ot sure whether I can
15 or not, without one bit of information.

16 THE COURT: What is the information that you think
17 you need?

18 THE WITNESS: I would like to know whether or not
19 the plaintiffs' data excluded sales outside New York City
20 and what they were.

21 Q Your middle graph represents sales of approximately
22 \$55 million, is that correct?

23 A In 1968, approximately \$60 million.

24 Q That is, your analysis?

25 A Yes.

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2 Q Those would be purchases within the metropolitan
3 New York area?

4 A No, these are the census data; these are the sales
5 of companies.

6 Q In 1967 the Census Bureau data showed sales of
7 stores locted in New York City of \$55 million?

8 A That is correct.

9 THE COURT: Let's go slowly now. Don't the ques-
10 tioner and the witness speak at the same time.

11 Q In your analysis that figure is placed in contract
12 with the figure of \$60 million representing your analysis of
13 the New York market?

14 A Yes, but I have already testified that they are
15 not directly comparable.

16 Q It's not directly comparable? Why not?

17 A Because my analysis understated the market to the
18 extent of dental students and federal dental purchases, which
19 were not included. The census bureau data makes not proviso
20 for shipments that went out of the New York metropolitan area,
21 nor for shipments that came in to the New York metropolitan
22 area.

23 Q That census figue of fifty-five million includes
24 sales outside the New York area, does it not?

25 A Yes, it does.

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1 MM:ar 3 Ellis - cross

2 Q And you have no way from looking at the census of
3 determining how much of that \$55 million represents sales
4 outside the area, do you?

5 A No, I have not.

6 Q With respect to that census bar, if we are able to
7 ascertain how much of those sales were outside the area for
8 comparability to the other two, you would have to shorten
9 that bar? You would have to indicate fewer sales? The
10 figure would be less?

11 A Either that or increase the plaintiff's bar, that
12 is why I hesitated to answer the question. I was not certain
13 whether or not the plaintiff's data included the sales going
14 out of New York or excluded it.

15 Q For you information on that, it has excluded sales
16 out of New York.

17 A During the luncheon break very hastily I totaled
18 the questionnaire, question number 2 from exhibit 31 of the
19 plaintiff. I got a total sales figure which will include
20 presumably sales that went out of New York from these
21 companies from whom data was collected on the questinnaire of
22 about \$28 million. I then took a figure from Healthco,
23 from the interrogatories which had been given earlier, which
24 was approximately \$9 million and arrived at a total of
25 \$37 million, approximately.

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2 All I want to understand, to be sure that we under-
3 stand each other, is that the plaintiff's exhibit had total
4 sales in the metropolitan area -- which showed \$31 million
5 roughly -- did it have a deduction of about \$6 million made
6 for sales that went out of the area.

7 Q At least.

8 A I am not trying to be contentious. I simply may
9 have misinterpreted the exhibit. I want to be certain.

10 Q You looked over those exhibits and you made a number
11 of remarks as to their inadequacy. Are you telling me in
12 examining that you did not understand what those exhibits
13 purported to show?

14 A Not the exhibits, the reference on this graph as to
15 the summary.

16 Q Now, earlier in your testimony you examined plain-
17 tiff's exhibits 32 to 40?

18 A Yes.

19 Q And you proceeded to criticize them at great length.
20 Are you telling me that you did not understand at the time
21 what those exhibits purported to show?

22 A Exhibit number 32, which I don't have here, I would
23 like to read the title, if I may.

24 Q No. You are now telling me that you reached the
25 conclusion as to their inadequacy without knowledge of what

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MM:ar 5 Ellis - cross

they purported to s...

A The total c hat exhibit is 31.4 million dollars. My own analysis indicated that purchases by dentists for the same year were \$60 million. The census bureau had included sales the preceding year of \$55 million, and I stated that I felt the survey, the plaintiff's survey, understated the market.

Q Let's get back to the census, sir. You state you have that graph at \$55 million. Now, do I understand you now recognize that the census figures include sales outside of the metropolitan New York area?

A Yes, I have never said otherwise. Wait a minute, I'm sorry. They include sales by companies located in New York, outside the New York area.

Q There's no way of determining from the census bureau how much of \$55 million is represented by sales outside the New York area?

A No.

Q Now, the census bureau figure contains sales by merchant wholesalers of dental equipment and supplies, is that correct?

A Yes.

Q Aren't there other merchant wholesalers under the census bureau definitions besides dental supply stores?

A Yes.

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Q What are those catatories?

A All the merchant wholesalers, there are many.

Q Merchant wholesalers covered by the census term represented in defendant's exhibit A?

A We showed earlier that on a nation-wide basis --

Q I am not interested in a nation-wide basis. I am interested in the metropolitan New York area and the census information set forth in defendant's exhibit A. It lists merchant wholewaler with, I believe, 188 establishments.

A That is correct, and they are all professional -equipment and supply distributors.

Q That is correct. Now, within that catagory of merchant supply wholesalers, isn't there included importers? Do you care to look at the census material contained in plaintiff's exhibit 49?

A I am not certain of that, but I know this --

Q Mr. Ellis, will you --

THE COURT: Now, wait. We cannot have more than you person talking at the same time. The greatest genius on earth as a reporter can't get a record on it. Now, please, let's start over. One at a time.

Q I would like to ask the question, you referred to plaintiff's exhibit 49.

THE COURT: All right, where is it?

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1 MM:ar 7 Ellis - cross

2 Q Page 387. Tell me, does not the title "Merchant
3 Wholesaler" -- include importers?

4 A 389?

5 Q 387.

B2 6 THE COURT: I will assume that it does,
7 but I don't know that means any of the 118 are necessarily
8 importers.

9 MR. SIRIGNANO: They are.

10 THE COURT: But there is nothing from the bare
11 figure that would show it.

12 MR. SIGIGNANO: But there is in the census material
13 which accompanies, which the witness has in front of him
14 and about which he stated he was familiar.

15 THE WITNESS: I don't believe I stated I was
16 familiar with the term "merchant wholesalers".

17 Q It includes importers?

18 A Yes.

19 Q Exporters?

20 A Yes.

21 Q It also includes wholesalers, the traditional
22 wholesaler?

23 A Yes, but --

24 Q Please. Therefore, that census questionnaire was
25 sent to importers, was it not?

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1 THE COURT: No, you can't tell that. Certainly
2 not. There may be no importers in the New York metropolitan
3 area. It doesn't follow at all because the definition in-
4 cludes importers that there are any importers in New York to
5 whom the questionnaire had been sent, if I follow the in-
6 terrogation correctly. I may be wrong.

7 MR. SIRIGNANO: - Your Honor, the defendant has
8 taken the position that the term merchant wholesaler means
9 dealer. I am pointing out that according to the census it
10 does not mean dealer; it means dealers, it means importers,
11 it means exporters, it means wholesalers, it means jobbers.

12 THE COURT: That is right, but there may not be
13 anybody in the New York area answering the description im-
14 porter-exporter.

15 MR. SIRIGNANO: Conversely, there is no proof that
16 the 118 are dealers.

17 THE WITNESS: On a national basis the data showed
18 that the sales done by merchant wholesalers, not classified as
19 dental supply dealers was negligible. If it was negligible,
20 on a national basis, it follows it is so on a local basis.

21 THE COURT: Can Mr. Ellis add anything to this?
22 If he can, let's have him do it. I am not preventing you from
23 making the argument to me.

24 MR. SIRIGNANO: Mr. Ellis has drawn some conclusions
25

from this which we do not believe are justified.

THE COURT: You can argue that to me, but let's get any testimony from him that in your view is relevant to the discussion. I think just arguing with him about it doesn't get us anywhere.

Q You mentioned earlier that 118 represented 118 different sellers?

A I believe I used the term establishments.

Q I would like you to read your testimony at pages 425 and 426.

A Yes, I said that.

Q YOU said 118 sellers?

A Yes.

Q That was an error, wasn't it?

A Well, do we want to go into the definition of seller? Should I have said establishment? I will stand corrected.

THE COURT: You say that was a mistake? YOU should have said establishment, instead of seller? What is the difference?

Q What is difference between establishment and seller?

A I didn't mean to imply any.

THE COURT: Seller and establishment to you mean

the same thing?

THE WITNESS: As I was interpreting the data it said 118. Stores would be another way of putting it.

THE COURT: Mr. Sirignano, just tell me directly, what is the point?

MR. SIRIGNANO: The point is establishment merely means stores. So Healthco represents four establishments today; S. S. White in 1968 represented four establishments; Spector represented two establishments.

THE COURT: Two stores? Two outlets?

MR. SIRIGNANO: Yes.

THE COURT: Does seller mean something different?

MR. SIRIGNANO: It means a competitor in the context of Mr. Ellis' testimony. He stated, for instance, that plaintiff's survey failed because obviously it had only 61, whereas the census showed 118 establishments. There is the comparison of establishments which was made by Mr. Ellis in comparison to 61 competitors set forth in the plaintiff's exhibit.

THE COURT: Does competitor and seller mean a company which might have 100 stores?

MR. SIRIGNANO: A competitor could be one company with a hundred establishments.

THE COURT: And one seller?

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MR. SIRIGNANO: And one seller.

THE COURT: Is that the way you interpreted it, Mr. Ellis?

THE WITNESS: I am lost.

THE COURT: I am completely lost.

THE WITNESS: I meant to state that the 118 meant the number of stores or number of establishments. I am not sure.

THE COURT: The 118 could be owned by one company?

THE WITNESS: Conceivably.

THE COURT: I understand, all right.

Q So you cannot draw the inference that 118 establishments means 118 competitors?

A No, I can't draw that inference. I testified earlier this morning in response to a question that asked these all could be branch stores. My answer was no, I believe not, for then the government or the plaintiff's survey would have shown a total of approximately \$60 million. I testified just a few minutes ago that I totaled the questionnaires during the luncheon break and I got a total, including the Healthco company, of approximately \$37 million. I can't relate the number of outlets to the number of owners. Would that be the comparable figure you are seeking or the number of companies that owned these?

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1 THE COURT: Mr. Ellis, may I make one suggestion:
2 Please, henceforth, do not ask a question of Mr. Sirignano.
3 You are here to answer questions, and the more questions you
4 ask the more argument we get, and we are getting nothing now
5 but just argument. Just answer the question.
6

7 And, Mr. Sirignano, do your best. Just put a
8 question and let's go on.

9 THE WITNESS: I apologize.

10 THE COURT: There is nothing to apologize about,
11 but this is just increasing enormously the burden that is
12 going to fall eventually on me, because the record is becom-
13 ing so confused that it will take me hours and hours, probably
14 late into some night, working probably until two and three
15 o'clock in the morning, ever to understand it.

16 All right. Let's go on. Question and then answer;
17 question and then answer.

18 MR. LUBLINSKI: Your Honor, we would like to mark
19 for identification Plaintiff's Exhibit Number 51, which is
20 the American Dental Association 1968 Survey of Dental
21 Practice.

22 THE COURT: Hasn't it been already marked for
23 identification?

24 MR. LUBLINSKI: We have already marked it.

25 THE COURT: Why do you want to mark it for identi-

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1 cation when you have already marked it? I take it you are
2 now offering it in evidence?
3

4 MR. LUBLINSKI: No; we are not.

5 THE COURT: If it is already marked for identifica-
6 tion, why are we stopping for that?

7 MR. LUBLINSKI: The reporter does not have the list,
8 your Honor.

9 THE COURT: You want the record to show that some-
10 thing is being marked for identification? All right. Go
11 ahead. The record will show it.

12 (Plaintiff's Exhibit 51 marked for identification.)

13 THE COURT: And you don't want to offer that in
14 evidence?

15 MR. LUBLINSKI: That is correct, your Honor.

16 There are several other exhibits. We would also
17 like to mark for identification Plaintiff's Exhibit 52, which
18 is an American Dental Association called "Distribution of
19 Dentists in the United States by State, Region, District and
20 County".

21 (Plaintiff's Exhibit 52 marked for identification.)

22 MR. JINKINSON: What year?

23 MR. LUBLINSKI: For the year 1969.

24 We would also like to have marked for identifica-
25 tion as Plaintiff's Exhibit 53 Healthman Power Source Book,

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Section 20, published by the United States Department of Health, Education & Welfare.

MR. JINKINSON: For what year?

MR. LUBLINSKI: For the year 1968.

(Plaintiff's Exhibit 53 marked for identification.)

MR. LUBLINSKI: We also would like to have marked for identification Plaintiff's Exhibit 55, which is a 1968 operations analysis of the United States Dental Laboratory Industry.

MR. JINKINSON: By whom?

MR. LUBLINSKI: Published by the National Association of Certified Dental Laboratories.

(Plaintiff's Exhibit 55 marked for identification.)

MR. LUBLINSKI: And the final exhibit is Plaintiff's Exhibit 56, which is an affidavit of David A. Ellis, sworn to on the 13th day of May 1970.

(Plaintiff's Exhibit 56 marked for identification.)

Q Will you look at these, Mr. Ellis? Do you recognize them?

A Yes; I do.

Q These are the source materials upon which you based your estimate of the New York market at \$60,000,000; is that correct?

A Just a minute. Could I check one publication,

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1 please?

2 Well, I didn't use the 1971 survey, but, lacking
3 that, they are, yes.

4 Q Mr. Ellis, you prepared a number of charts and
5 graphs, which are presently placed in evidence by the de-
6 fendant, I believe Exhibits B, C, D, J and K, five charts;
7 is that correct?

8 A Well, I'm not sure of the numbers. I know B is
9 correct. I have it here.

10 Q And four additional charts which you prepared, which
11 are presently in evidence.

12 May we have Exhibits C, D, J and K?

13 A No; I have only the one with the three bars on it.

14 MR. JINKINSON: Here is D., J, and K

15 THE COURT: He wants C.

16 THE WITNESS: I have them all.

17 Q When were these charts prepared?

18 A I am not sure. Do you want me to check my notes?

19 THE COURT: Please check your notes.

20 A (Continuing) I think most of them were prepared
21 within the last month.

22 Q Over several weeks ago?

23 THE COURT: Well, it would be within the last four
24 weeks.

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Is that as close as you can put it, Mr. Ellis?

THE WITNESS: I probably have the dates on here.

THE COURT: Do you want the dates, Mr. Sirignano?

MR. SIRIGNANO: No, your Honor.

Q Now, each of these charts includes in it graphs which are based upon ADA surveys of dental practice?

A Yes.

Q And the thrust of each of the charts there is necessarily based upon the premise that the ADA survey is reliable?

A Yes.

Q You have testified previously that the ADA survey is the definitive survey in the trade.

A Well, not in the trade. I think in the profession.

Q You mentioned earlier that there was some liaison between the American Dental Trade Association and the American Dental Association.

A Yes; I did.

Q Actually, there is no official communication between the two organizations?

A Not in a corporate or legal sense, no.

Q You had no participation in the making of the ADA survey of dental practice?

A I did not.

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Q You do have a personal acquaintanceship with the director of the ADA, who was responsible for that survey?

A I do.

Q Did you ever see any of the underlying material?

A By the underlying material, you mean questionnaires?

Q Yes.

A Well, the questionnaire is published.

Q I mean, the responses.

A The raw data?

Q Yes.

A No; I did not.

Q You have never seen anything more to do with that survey than any member of the general public has?

A No. I read the report. Yes; that is correct.

Q So all of your testimony with respect to the compilation of a market of \$60,000,000 plus all the various other evidence in those particular graphs is totally based -- I should not say "totally" -- is essentially based, however, on the survey in which you had no participation?

A Not entirely. There were some data from the Laboratory Association, but also I don't think I have ever said that the \$60,000,000 was the absolute, precise figure. I think I tried to be candid in stating I felt there were weaknesses. I also stated --

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Q Did you --

THE COURT: Have you finished your answer? Only one person can talk at a time.

THE WITNESS: No, sir.

THE COURT: Finish it.

A I also tried to point out that I felt it was not possible to in this industry tabulate all the buyers and sellers, and therefore I felt the most reasonable approach was using dentists' expenditures.

Q The figure of \$60,000,000 which you concluded from the Metropolitan New York area was set forth in that affidavit which is presently Plaintiff's Exhibit 56 for identification?

A It is marked Plaintiff's Exhibit 56, and on page 5 appears the \$60,000,000 figure.

Q So you made that calculation in May of 1970?

A Yes.

Q I take it since that time you have satisfied yourself that there were no errors and that the calculation was proper?

A To the best of my knowledge.

Q I understand you to say from your previous testimony that in your estimates you used the most conservative methods of doing these?

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A I tried to do this, yes.

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Q That affidavit was prepared for this litigation, was it not?

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A Well, I stated some of the early history of market analysis did not start out that way. I was subsequently called by an attorney in the firm of Sullivan and Wooster, in Boston, or Debevoise, Plimpton, here in New York, and they had the figures that I had prepared, and they said, "Would you be willing to make out an affidavit to this?" And I said, "Yes; I would."

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Q Isn't it true that prior to the filing of this case you had been requested by Mr. Cyker to make an estimate of the dollar sales in the New York market?

13

14

15

A Yes; but I think, as I said last week, I am not sure whether the litigation had been brought. I didn't know at the time. I may have learned it subsequently, but it seems like a routine request.

16

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18

19

Q You prepared figures at that time?

20

A Yes.

21

Q Those were not the figures which were set forth in that May 1970 tabulation?

22

23

A The figures I prepared at that time?

24

Q You prepared figures in '69 prior to the litigation and figures set forth in May '70?

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2 A I am not really certain. I am inclined to believe
3 they would be the same thing. I would have used the same
4 method, in any event.

5 Q Will you briefly explain the method you used in
6 arriving at this calculation?

7 A Would it help if I read the affidavit?

8 Q No.

9 THE COURT: Please don't ask Mr. Sirignano a
10 question. If you think it would help you, go ahead and read
11 it.

12 MR. SIRIGNANO: I would like to take this one step
13 at a time.

14 THE COURT: Do you want to withdraw that question?

15 MR. SIRIGNANO: Yes.

16 THE COURT: The question is withdrawn. Let's go
17 on.

18 Q Your method involved first ascertaining the number
19 of dentists in the Metropolitan New York Area?

20 A The number of dentists, yes.

21 Q Which you got from the ADA Exhibit 52, which is
22 the ADA Distribution of Dentists?

23 A That is correct.

24 Q Now, you modified the figure for the total number
25 of dentists by some fifteen per cent to take into account

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dentists who may have been listed in that directory but who may have retired; is that correct?

A Yes.

Q That gave you the active dentists within the area?

A Yes.

Q And by multiplying the number of active dentists by the average purchases within the Metropolitan Area, as listed in the ADA Survey of Dental Practice, you came to a figure which represented the purchases by dentists in the Metropolitan New York Area of supplies, and you applied the same thing to equipment?

A Yes; essentially.

Q Then with respect to sales of dental laboratories, you took the average purchases by dentists and multiplied that by the number of dentists?

A Yes; that is correct.

Q Then you took the total laboratory charges of this figure which represented total laboratory charges to dentists, active dentists in the Metropolitan Area and divided it by a percentage represented in another survey by an organization of dental laboratories which stated the percentage of their billings, which represented expenditures for equipment and supplies?

A That is correct.

552a

1 Q You applied that percentage to the total laboratory
2 charges, and on that basis you came out with a figure of
3 what constituted the total purchases of supplies and equipment
4 by laboratories?
5

6 A That is correct.

7 Q Do you think that is a valid system of arriving
8 at total purchases in the Metropolitan New York Area?

9 A Yes; I think it is a valid system of arriving at
10 total purchases. I think also it is the only method avail-
11 able.

12 Q Would it work for a state?

13 A If you had all the data that matched up, I think
14 it would be a reasonable approach.

15 Q And for the entire country?

16 A If you had the data, yes.

17 Q Now, I want you to examine Plaintiff's Exhibit 51,
18 and tell me, does that contain a table 18?

19 A I am sorry. I am having trouble finding it. Yes;
20 I have it.

EOT 4

1 Q Table 18 contains the average for purchases of
2 supplies by dentists, by non-salaried dentists in the United
3 States, does it not?
4

5 A Yes. It is a table that shows all of the pro-
6 fessional expenses, and the supply expenditure is one of the
7 data shown there, yes.

8 Q And equipment expenditures.

9 A No, it is not on Table 18. There is another
10 table.

11 Q There is another table which shows average equip-
12 ment expenditures, Table 22, is that correct?

13 A That's right.

14 Q It also has average expenditures for dental labor-
15 atories, does it not, or dentists?

16 A Back in Table 18 it shows commercial dental labor-
17 atory charges.

18 Now, Exhibit 52 also states the total number of
19 active dentists in the United States, doesn't it?

20 A 52?

21 Q Yes, Exhibit 52. The ADA distribution of dentists.
22 In fact, in your affidavit I believe you have a reference
23 to it.

24 A Yes. He estimated the average number.

25 MR. JINKINSON: What year?

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Ellis-cross

THE WITNESS: 1968.

Q These are actually 1967 figures, I believe, are they not?

A Well, the survey of dental practice covered the year 1967. The numbers of dentists and the distribution of dentists by state, region, district and county covers 1968.

Q Now, with that information, it should be possible to compute total sales to dentists and dental laboratories using your system for the entire United States, isn't it?

A Yes.

Q You stated this morning that --

A No, not sales. Purchases.

Q Purchases. You stated this morning that you were satisfied that total sales of dental products in the United States was approximately \$357 million, is that correct?

A I believe I said it was over \$315 million and I believe you showed me my affidavit from the Sybron case.

Q And the figure is \$357 million, is that correct?

MR. JINKINSON: 357.

MR. SIRIGNANO: 357.

A That's what the figure showed, yes.

Q Therefore, if this method of calculation is valid, shouldn't the figure you arrive at by making the same

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1 calculation for the United States at least approximate or
2 come close to either the 315 or the 357, both figures which
3 are presently in the record as total dental product pur-
4 chases in the United States?
5

6 A NO. I have already stated that it doesn't include,
7 in this case, federal dentists, nor does it include --

8 Q In other words, it should be lower, then?

9 THE COURT: Had you finished your answer?
10 This is just going to be a succession of dashes and it will
11 make no sense to me: where the answer is, dash, then
12 another question comes, or a half question, then the witness
13 will interrupt. IT will be meaningless as far as I am
14 concerned.

15 THE WITNESS: I'm sorry. Could we repeat the
16 question? I've lost track of it.

17 Q Then using the same system on national purchases,
18 the total should approximate the figure either of 315 million
19 or 357 million.

20 A It will not approximate 315 million. It has
21 to be larger than that. The question here is is it greater,
22 larger than, less than or equal to 357 million.

23 Q Yes.

24 A I'm not certain that at the point in time when
25 that analysis was done for the Sybron case that these same

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1 date were available to me.

2 I testified I have not read that affidavit in
3 four years. I'm willing to say that the purchase date
4 as you indicated would be a fairly reasonable way, or
5 reasonable way, to estimate the market using that method.
6 If you want me --

7 Q I am saying, if all this material is valid, if
8 the American Dental Association survey is a valid survey
9 and if it is reliable material, shouldn't they come up
10 with a figure which is somewhere approximately close to,
11 let's take the upper figure, \$357 million in 1967?

12 A I would like to say: if it were done on the same
13 basis.

14 Q You made a -- sorry. Please continue.

15 A I did make a market analysis at that time. I do
16 not remember exactly how I did it. If I used the purchase
17 data, the figures would come out, hopefully I would think
18 they would come out, the same.

19 Q Now, the Census stated a total of \$315 million
20 sales by distributores, is that correct?

21 A Yes.

22 Q You accept that as far as it goes as being the
23 correct amount of sales by dental distributors.

24 A Yes.

25 557a

2 Q That is for 1967.

3 A Yes, with the exclusions I think we've noted.

4 Q Now, the figure of \$357 million would take into
5 account sales by others who are not dental dealers of dental
6 products, would that be correct?

7 A Yes. I know that there would be a figure higher
8 than \$315 million, which would include such sellers as
9 manufacturers, for example. They are not counted in the
10 wholesale trade census.

11 Q Whether or not that figure of 357 million is
12 exactly correct, I think you stated earlier that you were
13 satisfied that that was, in view of your subsequent know-
14 ledge, in view of those census figures, a reasonably close
15 figure to total dental product sales in 1967.

16 A All right. I'll go along with that.

17 Q Now I would like you to look at a piece of paper
18 (handing).

19 MR. JINKINSON: May I see what you handed him?
20 Do you have a copy of that?

21 MR. SIRIGNANO: Yes. It is not an exact copy.
22 It is the same thing, though.

23 Q I would like you to make the calculations for
24 sales of dental products in the United States in 1967 on
25 the basis of the material which you have here, please.

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A Do you want me to do the multiplication?

Q We have a calculator here. Actually we have done the multiplication. But for your convenience, we have done it there, you may want to satisfy yourself that the multiplication is correct.

MR. JINKINSON: Is this for the year 1968 now?

MR. SIRIGNANO: '67.

MR. JINKINSON: I don't know what the point of this is, your Honor.

MR. SIRIGNANO: I think the point will be very clear when I am through with my questions.

THE COURT: Do we need this man to do figures? I hate to sit here, frankly, while mathematical calculations are being done. I'll take your mathematical calculations or I'll get Price Waterhouse to do it. But I don't know that this man --

MR. SIRIGNANO: I am faced with a problem here. Your Honor has permitted the witness to testify to conclusions.

THE COURT: Yes.

MR. SIRIGNANO: A survey which we have never had an opportunity to --

THE COURT: I've heard you say that time and time again. I'm well aware of that.

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1 JG 7

Ellis-cross

2 MR. SIRIGNANO: And also he has stated figures
3 like \$60 million, and nowhere in the record put in by the
4 defendant is there a chart which actually shows these cal-
5 culations, and I am just reduced to the necessity of having
6 to have the witness do those calculations.

7 If the witness would like to look at those and
8 see if they appear to be correct --

9 THE COURT: All right. I think it is a waste
10 of my time, but I'll sit here and do it. All right. Go
11 ahead and make the calculations.

12 Does he know what calculations he has to make?

13 Q First I would like you to satisfy yourself that
14 from the date which you used for reaching a figure of
15 \$60 million for the metropolitan New York area that I have
16 used the same basic data.

17 (Pause)

18 A I'm sorry, but I don't agree with the first
19 figure, the number of total active dentists.

20 Q What is the disagreement there?

21 A The method I used, I took the number listed by
22 the counties that are involved in this case and I reduced
23 that number by approximately 15 per cent, using data from
24 the Public Health Service.

25 The table here for the United States lists

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109,000 dentists. If you reduce that by 15 per cent,
you'll come up with something in the neighborhood of 94,
93 thousand. And the table I've been handed says the
number of total active dentists is 99 thousand.

Q Would you want to use the Public Health Service
figure?

A I certainly think that if we are going to track
through the method, we ought to use the same method consis-
tently.

THE COURT: Mr. Sirignano, I have your repre-
sentation that this is the only way that we can do this
and that we have got to do it?

MR. SIRIGNANO: I can't see how else we can
do it.

THE COURT: All right. All right.

MR. SIRIGNANO: The last thing I want to do
is --

THE COURT: All right. It is just a cat and
dog fight between you and this man arguing about details.
He says now he disagrees with your first step. All right.
Now let's go to the second step.

MR. SIRIGNANO: I propose to show that by
using the same system of calculation, and I think this is
important, using the same system by which he arrives at

the figure \$60 million for the metropolitan New York area, I intend to show that using the same system it will indicate that total sales within the United States would have been for 1967 in excess of \$500 million when in fact the Census indicated in that year that the total sales of dental products were \$315 million by distributors, and Mr. Ellis has previously estimated the total at being \$357 million.

THE COURT: Do you want to say something?

MR. JINKINSON: I don't want to say anything other than that the first premise the witness said is he is not using the same method and the same figures.

THE COURT: Can we just go on question and answer? All right. What question do you want to ask him now? Let's just ask a question and we'll go one question at a time. Now what is the next question?

BY MR. SIRIGNANO:

Q In your affidavit, how many active dentists did you state there were in 1968?

THE COURT: Now just look at your affidavit and just make one answer and don't volunteer anything, not a single word volunteered.

Repeat the question, Mr. Reporter.

(Question read)

A 9,412 in the relevant New York counties and 2,826

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2 in the relevant New Jersey counties.

3 THE COURT: All right.

4 Q How many nationally?

5 A Let me see.

6 Q Page 6 of your affidavit.

7 A I beg your pardon. It is 99,500 is the ADA
8 figure.

9 Q That is the ADA figure. That is the figure which
10 is used --

11 A That is the figure --

12 THE COURT: Please. What is the question?

13 THE WITNESS: How many active dentists were
14 there in the United States.

15 THE COURT: How many were there?

16 THE WITNESS: 99,500.

17 THE COURT: All right. Next question.

18 Q If you multiply that figure by the average expendi-
19 ture of dentists in 1967, what would your total be for
20 supplies?

21 A I don't think I can do the multiplication on the
22 stand. However, the sheet --

23 THE COURT: Take a piece of paper and we can
24 go the nearest adding machine --

25 MR. SIRIGNANO: We have one here.

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Ellis-cross

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THE COURT: Do you want me to send up to my chambers and get an adding machine?

MR. SIRIGNANO: We have one here.

THE COURT: Let's have the question again. I don't want anything but just the answer to this question. What is the question? This is an exercise in multiplication.

Find the question, please.

(Question read)

THE COURT: What is that figure?

MR. SIRIGNANO: The answer to the previous question, which listed the number of active dentists in the United States.

THE COURT: What is the figure?

MR. SIRIGNANO: 99,500.

Q Multiply that figure --

THE COURT: Mr. Sirignano, would you please be good enough to construct your question all over again? My well meant efforts have done nothing but defeat and delay us. Start all over again.

Mr. Ellis, please listen to this question.

MR. SIRIGNANO: Your Honor, --

THE COURT: Can you reconstruct the question? Would you be more comfortable if you sat down?

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Ellis-cross

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MR. SIRIGNANO: No, your Honor. I am considering this entire line of questioning, which I see is creating difficulties, and I am trying to think how it may be possible to accomplish the same end without the obvious difficulties which this particular method is --

THE COURT: Maybe I'm too impatient, Mr. Sirignano, and I don't want to be. I just want us to have a clean, understandable record.

MR. SIRIGNANO: Since I don't think the witness will be completing his testimony, I will not be completing my examination, I wonder if I could ask the witness to privately make the computation which I requested.

THE COURT: Yes.

MR. SIRIGNANO: And come back with his answer at the time we continue his cross examination tomorrow.

THE COURT: Well, could you tell us, just so we'll have the thing down in black and white in as simple a fashion as possible, exactly what calculation you want him to make?

BY MR. SIRIGNANO:

Q Mr. Ellis, may I ask you, on the basis of the same material which you used, using the same methodology, will you attempt to, or will you calculate total sales on the basis of purchases of supplies and equipment and

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purchases of supplies and equipment by dental laboratories
for the years 1967 and 1968?

A I will.

THE COURT: Do you understand that question?

THE WITNESS: Yes. And I'll use exactly the
same method that was set forth in my affidavit.

Q And will you have the answer for us tomorrow?

A If I may borrow your calculator. May I?

Q We could make available --

A If you would.

MR. DE MARCO: Your Honor, we will have a
calculator available for Mr. Ellis this evening.

THE COURT: All right.

THE WITNESS: These are very large numbers.

THE COURT: Mr. Ellis, you understand what
you are to do?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

BY MR. SIRIGNANO:

Q Now, Mr. Ellis, let's go to your calculations
of the \$60,000,000. The first step you took was to take
the number of dentists listed for the metropolitan New York
area as shown in the ADA booklet marked as Defendant's
Exhibit 52, I believe, is that correct?

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2 A Yes.

3 Q You believe that that book is authoratative?

4 A Well, with the usual limitations of lists, which
5 can be inaccurate as soon as they are published, if someone
6 dies, et cetera.

7 Q To ascertain the number of dentists in metropoli-
8 tan New York, you reduce that number by 15 per cent.

9 A Approximately, yes.

10 Q To take care of dentists who had retired.

11 A Yes.

12 Q That 15 per cent figure came from the U. S. Public
13 Health Service.

14 A That's correct.

15 Q Isn't it true, Mr. Ellis, that the U. S. Public
16 Health Service sets forth figures for the total number of
17 dentists in the United States and by state which are smaller
18 than the figures shown in the American Dental Association
19 book?

20 A I'm sorry. Does anyone know what page it is on?

21 Q I asked you to compare the listings for the
22 State of New York and the State of New Jersey contained on
23 page 81 of the Public Health Service book and pages 37 and
24 39 of the ADA book.

25 A What was the number in the Public Health Service

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book?

Q 81.

A I have them. The ADA numbers are larger because, as we stated, they do include retired dentists, or some of which are retired.

Q The U. S. Public Health Service book also contains retired dentists, doesn't it?

A I'm not certain. It doesn't say that.

Q If you look in the early part of the book.

A There may be a difference here of a graduating class, whether one figure was taken at mid-year and one figure was taken at year end.

Q Mr. Ellis, these are the two books which you, yourself, used, are they not?

A That's correct. But I only used the Public Health Service report to get a ratio of active dentists.

Q If that Public Health source book was valid for getting that ratio, then wouldn't there be some validity to the actual figures which it has for dentists?

A Well, what I was concerned with was that the State of New York and New Jersey were not something like Florida and California, where there are many retired dentists. The ratio was very similar throughout most of the states, so I'm not sure -- there may be a difference

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here of definition in the numbers of dentists, but the ratios are relatively unchanged.

Q But the one you used happened to be the higher figure.

A I'm sorry?

Q The particular source book you used was the book which contained the highest number.

A The highest number?

Q In other words, the number of dentists in the ADA source book which you used. -You considered it valid for the purpose of taking the number of dentists out of that, whereas you did not consider the other book, the U. S. Public Health Service book, which contains a smaller number of dentists, valid for that purpose.

A The reason I used this book was that the number of dentists were listed by county and the problem that is set forth is to establish the purchases for metropolitan New York. The Public Health Service book doesn't have a comparable count of dentists in the metropolitan New York area. It has a count of dentists by state.

So I used the American Dental Association book, which listed the dentists by district and county and then reduced their numbers by the ratios shown in the Public Health Service book. There were no comparable ratios in

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1 the ADA publication and there were no comparable county data
2 in the Public Health Service publication. I used the best
3 estimate that was available.
4

5 Q Nevertheless, the Public Health manpower source
6 book does indicate, if compared in terms of the total United
7 States dentists, a figure which is somewhat, approximately
8 4 per cent, lower than the figures shown in the ADA book.

9 A Yes. There is a definitional difference between
10 the two publications. But I don't think it would affect
11 the ratio significantly. My intent here -- I knew that
12 the ADA data contained dentists that were not active. My
13 intent was to reduce that figure down to an active dentist
14 level.

15 In all probability the Public Health Service
16 one begins with a publication called the Americal Dental
17 Directory, I believe, which is the basic source document
18 for this also (indicating). The ADA maintains computer
19 tapes with dentists listed on it and their addresses and
20 so forth. I'm not certain anyone else has such a list.
21 It may well be the only available source for that informa-
22 tion.

23 Q Now, you took that figure for metropolitan New
24 York obtained from that source and what was your first step
25 in terms of ascertaining purchases of supplies?

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A I took the number of active dentists in each area, took the gross income for the particular state that was involved, multiplied that by the per cent of gross income listed by the American Dental Association as being dedicated to supply purchases, added to that the average amount spent on equipment and multiplied it by the number of active dentists to get a total of supplies and equipment.

Q Now, before we follow this up, I would like you to look at the questionnaire, the questionnaire which is contained at the beginning of this book, which sought to elicit the answers of dentists as to purchases of supplies.

A I have it.

Q What does it state there opposite that figure?

A It says dental supplies, drugs and so forth, not equipment or office supplies.

Q And what does "and so forth" stand for?

A Well, I can't be certain.

Q Apparently this listing in the questionnaire called for and allowed the dentists to put into this category something which was not dental supplies or drugs.

A No, I don't think that's a correct assumption. It may very well have been anesthetic needles, which are not listed here. It could have been any one of a myriad of products which are not listed. It simply says "Dental

supplies, durgs and so forth, not equipment or office supplies."

Q That et cetera certainly allowed judgment on the part of the dentists who answered that with respect to including something which they did not consider to be either a "dental supply" or "a drug," did it not?

A Well, it says here "Dental supplies, drugs and so forth." This is what it says.

Q All right. Actually, this survey nowhere shows the average expenditures for a dentist in metropolitan New York, does it?

A No, it does not.

Q You had to arrive at that by a further process. Would you explain that process step by step, please?

A First of all, the metropolitan New York area has the largest -- has by far the preponderant majority of the dentists in the State of New York located here. The closest available data for this area was the average gross income for the State of New York. The closest available percentage of expenditures for supplies was for the middle east region, which included New York amongst some other areas.

I would also point out that that percentage is

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the lowest one shown in the table.

Q That is the lowest for any region, you say.

A Yes.

Q But that percentage of 5.1 per cent is -- how is that figure reached?

A They total up the expenditures for supplies and divided it by the gross income.

Q Including dentists in West Virginia and the District of Columbia.

A Whatever the middle east region is defined as.

Q On what basis can you conclude from that that the percentage figure in percentage of gross income of a dentist in New York would be 5.1 per cent within the entire area in the middle east? Wouldn't there be variations from state to state?

A There probably are. This is the closest available data to it, and the New York dentists would be a significant proportion of this. It would carry a relatively high weight in computing the average.

Q So you took the figure of 5.1 per cent. Actually, wouldn't the closest accurate data which is descriptive be the average supply expenditures for the middle east?

A Average supply --

Q Which is listed.

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1 A Not necessarily, because why would we go to that
2 extent when we already have the average gross income for
3 dentists in New York State, which is much closer.
4

5 Q But you can only surmise that 5.1 per cent is
6 applicable to New York; you cannot tell from the material
7 that you have there that 5.1 per cent is a correct figure
8 for New York.

9 A No, I can't. I can't tell it is absolutely
10 accurate. But, as I've stated throughout, I feel these are
11 conservative. This is the smallest percentage in the table.

12 Q Might that percentage be even smaller in New York
13 State?

14 A It might be.

15 Q So actually the one place where that 5.1 per cent
16 would be an unquestionably correct application would be
17 to the gross income of all dentists in the middle east
18 region. There, there wouldn't be any question about the
19 correct applicability.

20 A But the gross income of dentists in the middle
21 east region is not the same as the gross income of dentists
22 in New York State. I was attempting to get as close as I
23 could in the market we are attempting to delineate. There
24 is no point in deliberately broadening the range of an
25 estimate of this kind.

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1 JG 22 Ellis-cross 630
2 Q But apparently that entire middle east section was
3 valid for pulling out the 5.1 per cent but not valid for
4 pulling out the average expenditure, is that correct?

5 A It is the only percentage that is offered. There
6 was no published figure for dentists in New York State.

7 Q Wouldn't it have been equally valid -- if you
8 think 5.1 per cent is valid because a good number of the
9 dentists in there are New York State, then wouldn't it have
10 been equally valid to choose the average expenditure in the
11 middle east because a good number of those dentists were
12 from New York State?

13 A No, because the thing is, I was trying to get as
14 close to the marketing area as I could with the data which
15 was available.

16 Q All right.

17 A If I had available a gross income figure for New
18 York State, why would I extend it, why would I broaden the
19 nature of the thing?

20 Q I do note that by applying that 5.1 per cent from
21 the middle east and ignoring the average expenditure from
22 the middle east, when you apply it to the New York State
23 gross figure you come up with a higher figure than you would
24 have had you taken the only average expenditure for equipment,
25 for supplies which is actually shown in your source material.

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1 which is applicable to dentists in the meteropolitan New
2 York area.

3
4 A I would like to point out something, if I may.

5 THE COURT: This is an interesting argument.
6 It is not a trial of a lawsuit, but it is an interesting
7 symposium and discussion, and I'm sorry that I have to
8 stop now and go upstairs. I've struggled, but I've given
9 up the struggle. I mean it can't be a question and answer
10 form; it is a philosophical and statistical symposium
11 between two very bright and well informed people, and if
12 I ever live long enough to read this record, I'm sure I'll
13 get a good deal out of it.

14 All right. Suppose we stop until tomorrow
15 morning at 9.30.

16 Now, observing the manner in which we have been
17 making this record, and against my intimate knowledge and
18 experience with our reporters, who are the most expert in
19 the world, I do know that there are bound to occur many,
20 many errors in the stenographic record, and for that reason
21 I am going to have to direct each side to read the record
22 carefully for corrections, and at the end of the trial I
23 want us to have a session in which we will go over the
24 stenographic record and I would like each side to point out
25 where the record should be corrected.

* * * *

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 rebuttal, we would not need for the case in chief any more
2 than Monday.
3

4 MR. JINKINSON: I don't think so, your Honor.

5 THE COURT: Then we will go on until 12:45 today,
6 and then we will resume on Monday morning, and we will
7 finish the defendant's case, and then we will take a look at
8 the situation as to the Government's rebuttal.

9 All right. Do we have the witness?

10 MR. JINKINSON: We have two witnesses who are being
11 cross-examined.

12 THE COURT: Mr. Cyker wants to go away. Let's
13 finish with him so he can go away to where he wants to go.

14 MARVIN MEYER CYKER, resumed:

15 THE COURT: Let's think of the reporter getting
16 an accurate transcript. Don't talk too fast and don't more
17 than one person speak at the same time. These are expert
18 reporters, but they can't do the impossible.

19 CROSS-EXMINATION

20 BY MR. SIRIGNANO:

21 Q Mr. Cyker, when Healthco acquired Sechter, it
22 had at that time an outlet in Hackensack, New Jersey and one
23 in Manhattan; is that true?

24 A Yes, sir.

25 Q That outlet in Manhattan was a small outlet near

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MMP Cyker - cross

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Columbia; is that true?

A Yes, sir.

Q Do you recall approximately what the sales of that outlet in Manhattan were?

A I think \$400,000.

THE COURT: \$400,000?

THE WITNESS: Yes.

THE COURT: That is, a year?

THE WITNESS: Yes.

Q The outlet in Manhattan?

A Yes, sir.

MR. JINKINSON: Your Honor, I think I have been too lenient in connection with this matter.

What are you handing the witness? I am entitled to see it first.

MR. SIRIGNANO: Haven't you been given a copy? I am sorry.

Q Would you read this document, please?

A Which part?

Q The document.

MR. JINKINSON: Which part? All of it?

Q (Continuing) I think I was directing your attention to Paragraph 8, on page 4.

A "8. In 1968, Sechter total sales to dentists,

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1 dental laboratories, schools and institutions in Metropolitan
2 New York were \$1,762,507. Of this amount, only some \$10,000
3 to \$15,000 was sold from the college store, which has since
4 been closed."

5 Q So that isn't it true that the outlet which Sechter
6 maintained in Manhattan accounted for from ten to fifteen
7 thousand dollars in sales in 1968?

8 A Well -- Well, that can mean ten to fifteen thousand
9 dollars was only sold to the students at what is called the
10 college store. You asked me a question, how much business
11 was done in Manhattan through this store across from
12 Columbia. I really don't know. Sechter had one bookkeeping
13 system.

14 The best of my knowledge, I felt that they did
15 about \$400,000 worth of business with people in Manhattan,
16 including the people they are selling directly to the
17 University, which was not called like a college store selling
18 just the students, because students buy a little instrument
19 when they break down, a little burr.

20 I answered the question as completely as I could.

21 Q What is this document, Mr. Cyker? Do you recognize
22 the signature at the bottom?

23 MR. JINKINSON: I think the document speaks for
24 itself.

25 MR. SIRIGNANO: The document is not in the record,

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1 and at this time I would like to introduce it in the record.

2 THE COURT: Is this in evidence?

3 MR. JINKINSON: It is filed in the case as part of
4 the pleadings in the case.

5 A This document is signed by my brother, who runs
6 the dental division.

7 MR. JINKINSON: I must admit here I am at a loss.
8 This is an affidavit which we filed at the beginning of the
9 case in connection with a motion for preliminary injunction.
10 I am not clear in my mind as to whether this affidavit is
11 in fact in the record in terms of the case.

12 THE COURT: It is in the record, and it must be
13 a part of the Clerk's files and therefore is part of the
14 official records of the Court. But if you want it in
15 addition, I don't know technically whether it is easier to
16 mark it as an exhibit here or not. If it is physically here,
17 why not mark it as an exhibit?

18 MR. JINKINSON: It is an affidavit made by his
19 brother, not made by him.

20 THE COURT: I understand, but this man is not
21 himself personally a defendant. Healthco is the defendant,
22 and therefore I think it is properly admissible. It can be
23 signed by any responsible officer of the corporation.

24 Do you want it marked?

25 580a

2 MR. SIRIGNANO: Yes.

3 THE COURT: You acknowledge its authenticity?

4 Well, take a look at it.

5 MR. JINNINGSON: I don't object to it. It is part
6 of the pleadings in the case.

7 THE COURT: It may be a little easier if I can have
8 it as part of the exhibits. Mark it with the next Government's
9 exhibit number.

10 What number do you want to give it?

11 MR. SIRIGNANO: 57.

12 THE COURT: All right. 57 is received in
13 evidence at this time.

xxx

14 (Plaintiff's Exhibit 57 was received in evidence.)

15 THE COURT: It is an affidavit by Mr. Cyker's
16 brother.

17 THE WITNESS: Yes.

18 MR. SIRIGNANO: -- who was at the time of the
19 making of the affidavit and, incidentally, still is an
20 officer of Healthco.

21 Q Mr. Cyker, do you recall the date of the Sechter
22 acquisition?

23 A Not the exact date. I know the summer of '69.

24 Q Do you recall how long before the actual acquisi-
25 tion took place you were in negotiations for it?

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Cyker - cross

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A It was not much time at all. I think it was one of the quickest acquisitions --

Q Was it a matter of weeks or a month?

A Less than a month.

Q How about the negotiations for Hebard? How long was that negotiation prior to its actually being closed?

A Well, are you asking me prior to actually being closed when lawyers hold things up and go into details, or the day I discussed buying it?

Q From the day you discussed buying it until the day it was closed.

A I want to know what kind of question you are asking me. When you make an acquisition, you agree to buy a business but buy it as of next week, let's say.

As far as I am concerned, it's bought. We have a deal. Now, what time it takes for a lawyer to close the final papers I don't know. I cannot answer this question.

Q According to the record, the actual acquisition took place at the beginning of November.

A Yes.

Q Actually, how long before that had you first started your discussions?

A It could have been a couple of months or so.

Q Mr. Cyker, are you familiar with the term "jobbing"

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among dental dealers?

A Jobbing? Yes.

Q What does it mean?

A Jobbing means where a dealer does not have the line, so he buys from a jobber, the same thing like equivalent to a dress manufacturer makes dresses, and he has a distributor who sells the dresses to the store, to the small stores.

Q There are jobbers in New York, aren't there?

A I believe so, yes.

Q Apart from that particular meaning, isn't there a meaning to the word which refers to sales made by a dental dealer who has the line, selling to someone else, who is purchasing it for resale?

A I don't know what you mean by that.

Q Well, for instance, doesn't Healthco today sell some of its products not to dentists or dental laboratories or institutions but in fact to other dealers?

A Not as a rule. But Healthco and my own business before, I would sell to any competitor -- tough competitors, but we are not enemies. So if a competitor runs out of some merchandise and he calls up a store and needs something in a hurry, we would accommodate him. And the same thing they would do for us.

Q Doesn't Healthco today presently sell dental

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products in New York to companies who are in turn reselling them?

A They could.

Q Do you know as a fact whether or not they are?

A I cannot specifically give you the who or what, but it is possible.

Q Isn't the Healthco company today actually making sales to the very mail order houses which they are claiming as their substantial competitors?

A Healthco is making sales to anybody who wants to buy from us. We have no restrictions who to sell to. Anybody who has credit and has use for our products, we sell to.

Q In those instances where Healthco sells to another dealer, does it charge the same that it would charge when it sells to a dentist?

A That is a question I got to answer two ways:

Sometimes we would sell to a dealer just at our own cost, accommodating him, because he has to resell it. Now, if it is a dealer like you call a jobber that on occasion would buy a quantity, he wants a certain quantity of burrs or merchandise, then we negotiate the price.

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Cyker - cross

THE COURT: But it is not the same price as you would sell to a dentist.

THE WITNESS: Your Honor, if a dentist would buy at the same quantity the same particular item, he probably could get it at the same price.

BY MR. SIRIGNANO:

Q Would the records of Healthco in the metropolitan New York area disclose to whom it is making sales?

A Oh, sure. We have, I imagine, for every customer, yes.

Q That is, would it disclose which of those sales were to other dealers or to mail order houses?

A It should.

MR. SIRIGNANO: I was wondering, your Honor -- I don't want to bring Mr. Cyker back -- if it would be possible for me to get the figures as to the sales by the Healthco metropolitan New York outlets to other dealers and to mail order houses?

MR. JINKINSON: I don't see the purpose. I don't see the relevance of such a request, your Honor.

MR. SIRIGNANO: I can explain the relevance, your Honor.

THE COURT: All right.

MR. SIRIGNANO: I believe that these records will

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1 jgk2 Cyker - cross
2 disclose that the Healthco outlets in New York are presently
3 and regularly making sales to the very mail order houses
4 whose strong competition they are alleging exists. I
5 believe an inference can be drawn from that. While I don't
6 contend there is anything illegal or improper in making
7 those sales, I believe certain inferences can be drawn from
8 their willingness to sell to those people whom they allege
9 to be such strong and important competitors.

10 MR. JINKINSON: I don't see the relevance of that
11 statement to this case or to any issue in this case what-
12 soever. As a matter of fact, the inference can be drawn
13 otherwise that Healthco is in this market competing vig-
14 orously. I don't understand it.

15 THE COURT: Do you have names of the mail order
16 houses?

17 MR. SIRIGNANO: I can't give the specific ones.
18 I can name several. I would like the records of sales --

19 THE COURT: Now wait. I am prepared to require the
20 defendant to produce this information, but we have got to
21 know precisely what you want. The names of the customers
22 and the period of time involved, and I will give them a
23 reasonable time, of course, to do this.

24 It doesn't have to be done by Mr. Cyker.

25 Now, are you now able to tell me the names of the

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Cyker - cross

mail order houses or do you want to do that later?

MR. SIRIGNANO: I would like to do that later.
We will be able to make up a list within a matter of minutes.

THE COURT: All right. Make up a list. And
what is the time involved?

MR. SIRIGNANO: From 1971 on.

THE COURT: From 1971 --

MR. SIRIGNANO: And '72. '71 and '72.

THE COURT: All right. 1971 and 1972. And you
are going to produce a list. All right. When you have the
list ready, then I will make a direction to the defendant.

All right. Let's go on.

MR. JINKINSON: I will note my objection at that
time.

THE COURT: Of course. I understand.

And you want dollar sales, I assume, to these
identified companies for these two years.

MR. SIRIGNANO: Yes.

THE COURT: All right. I will do that.

BY MR. SIRIGNANO:

Q Mr. Cyker, yesterday you mentioned about represent-
atives from manufacturers visting dentists in terms of
giving them information. Do you recall your testimony to
that effect?

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1 A Yes. Yes, manufacturers' reps.

2 Q Those manufacturers' reps are not there to take
3 orders, are they?

4 A Many times they take orders.

5 Q And those orders are serviced through local
6 dental dealers, aren't they?

7 A Yes, sir. If a doctor is interested in a product
8 and he wants to buy it, the rep would ask him who his dealer
9 is, you know, and he would --

10 Q So the general purpose of these manufacturers'
11 representatives' interest is to get interest in the product
12 so that the dentist will purchase it from his local dental
13 dealer, isn't that so?

14 A From any dental dealer. No, that isn't so. The
15 manufacturer's rep is only there to introduce the manu-
16 facturer's product. The dentist has the freedom to buy it
17 anywhere he wants to.

18 MR. SIRIGNANO: I have no further questions.

19 THE COURT: All right. Any redirect?

20 MR. JINKINSON: No, your Honor.

21 THE COURT: All right. Thank you, Mr. Cyker. You
22 may be excused.

23 (Witness excused.)

24 THE COURT: Now you want Mr. Ellis?

25 * * * *

1 jgk
2 THE COURT: All right. Can't we ask a question
3 and get an answer and go on and get this thing over with?
4 BY MR. SIRIGNANO:

5 Q Mr. Ellis, I asked you to make some calculations
6 yesterday with respect to total purchases of dental products
7 in the U.S. in 1967 and '68, using the same methodology
8 you had used for calculating total purchases of dental
9 products in the metropolitan New York area during those
10 periods.

11 Have you done so?

12 A Yes, I have, Mr. Sirignano. But I was unable to
13 do it for 1967 because I don't have a book of dentists for
14 that year. I did it for 1968, which is consistent with
15 the New York market affidavit that I filed before.

16 Q And in making this calculation you relied on the
17 same source material you used for making your calculations
18 in the metropolitan New York market, is that true?

19 A That is true.

20 Q What is the result of those calculations?

21 A The final U.S. 1968 figure? Is that what is
22 desired?

23 Q Yes.

24 A 529,364,000, approximately.

25 Q On the basis of the census figures for 1967, on the

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1 basis of your knowledge gained in the course of your working
2 as a statistician for the American Dental Trade Association,
3 do you have any opinion as to whether that would be a
4 correct figure for total sales in the U.S.?

5 A I have estimated total purchases.

6 Q Or total purchases?

7 A Not sales.

8 Q Total purchases in the U.S.?

9 A I believe these are the most reliable sources we
10 have to estimate this, yes.

11 Q Let's get back to your calculations for the
12 metropolitan New York area. As I recall, your first step
13 after ascertaining them was to ascertain the number of
14 active dentists in the metropolitan New York area, is that
15 correct?

16 A Yes, that is correct.

17 Q You then made certain calculations to determine
18 average purchases of dental supplies. Will you describe
19 what those calculations were?

20 A I was using an American Dental Association survey.

21 May I give the title, your Honor? I can't seem
22 to find the exhibit.

23 THE COURT: Of course.

24 A It is the 1968 survey of dental practice done by
25

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the American Dental Association.

Q That is Exhibit 51 marked for identification.

A I'm sorry. I just can't seem to find it in front of me. I have a large pile of papers.

Table six in that report shows that in 1967 non-salaried dentists in New York and New Jersey had an average gross income of 45,196 and 43 thousand and three dollars respectively. Although the survey did not particularize the expenses of New York and New Jersey dentists, it does show that in 1967 dentist in the middle east region, consisting of Delaware, Maryland, New Jersey, New York, Pennsylvania, West Virginia and the District of Columbia, spent 5.1 percent of their gross income on dental supplies, drugs and so on, not including equipment or office supplies.

The survey also shows that in 1967 the average cost of equipment purchased by dentists in the middle east region was \$1,190.

I assumed that dentists in metropolitan New York made approximately the average purchases for dentists in the middle east region; and I applied that percentage against this gross income to determine their expenses for supplies. The equipment expenditure average was already given.

Does that answer the question?

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Ellis - cross

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Q You took those average figures and multiplied it by the total number of active dentists, is that correct?

A Of active practicing dentists. Chairside dentists, I would think, so we don't get a problem. There is a question of a dentist that may be active but may be teaching and not consuming products. Perhaps chairside might be a more descriptive term, although I didn't use it in the affidavit.

Q That would have given you a figure for 1967, is that correct?

A Not entirely. I used the 1967 average from the survey, but I was preparing data for the year 1968. So I used the 1968 counts of dentists, because it can be shown mathematically that later on in the affidavit I extrapolate the figures to 1968.

Mathematically there is no difference in the calculation formula.

Q You made an increase in those figures of ten percent, isn't that true?

A Yes, sir.

Q What was the basis of that increase by ten percent?

A The report itself indicated, on page 14, the following. It said: "However, in 1967 expenses were rising at the rate of slightly more than ten percent a year."

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Ellis-cross

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Now, that would be the national picture. But I used that as what I felt was a reasonable extrapolation point.

Q So you raised the figure from 1967 to '68 by ten per cent.

A Yes.

Q Mr. Ellis, isn't it true that in the 1970 survey of dental practice, the American Dental Association shows that between 1967 and 1970 the increased expenditures of dentists in the middle eastern area for equipment rose only nine per cent in the three years?

A In the 1970?

Q Yes. You have it in front of you there, Exhibit 54.

A I don't find it readily. But this is entirely possible because 1970 was a very bad year for equipment sales. I indicated earlier that economically things were not good and many dentists were not making capital investments in equipment. I don't know where to find such a thing in the report. I guess you took the average expenditure for 1970 and compared it to the '67 figure in the other report.

Q That's correct. If tha- figure were nine per cent, wouldn't this at least raise a doubt in your mind as to

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Ellis-cross

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whether in fact ten per cent was the proper figure to apply to the equipment?

A No, sir, it would not.

MR. JINKINSON: I object to the question, your Honor. I object to the form of the question. I object also to counsel arguing with the witness.

THE COURT: Read the question, please, Mr. Reporter.

(Question read)

THE COURT: I'll permit it. Overruled.

A No, sir, it would not. I've testified twice that 1970 was a bad year for equipment, sales and purchases, and I extrapolated these data to 1968.

Q What was the next step in --

THE COURT: Wait. Wait. Wait.

Have you finished?

A (Continuing) It is quite possible they could have gone up in '68, up in '69 and then down in 1970, and there is a three year hiatus there that doesn't say anything about the period in between. In my judgment there would have been an increase in equipment sales from 1967 to 1968.

Q What was your next step, Mr. Ellis, with respect to dental laboratory purchases?

594a

1 A The same American Dental Association survey of
2 dental practice taken for 1967 showed that dentists in the
3 middle east region spent 10.7 per cent of their gross income
4 on commercial dental laboratory charges. Using this
5 average figure, I estimated that dentists in the relevant
6 New York counties would have spent approximately \$4,836
7 for laboratory charges in 1967. That's multiplying their
8 gross income by the percentage I just gave.
9

10 And dentists in the relevant New Jersey counties
11 spent approximately \$4,601. That's multiplying the average
12 gross income in New Jersey by the percentage.

13 I had already calculated an estimate of the prac-
14 ticing dentists. We went through that earlier. So I
15 multiplied that by those two dollar figures I just gave
16 you and added them together to get the total commercial
17 laboratory billings for 1967.

18 Subsequently --

19 Do you mind if I take this out of the sequence
20 in which I did it in the affidavit? It might make it
21 clearer.

22 Q All right.

23 A Subsequently I did extrapolate this figure to 1968
24 as I did with the dentists. Then I went to a report pub-
25 lished by the National Association of Certified Dental

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1 Laboratories, and it is marked Plaintiff Exhibit 55, and
2 obtained the information that in 1968 dental laboratories
3 spent 19.8 per cent of the amount of their total billings
4 for dental supplies and 1.1 per cent more for depreciation
5 of equipment and for tools.
6

7 Q Are you finished?

8 A Well, I have to do one more calculation.

9 I added those two together and got 20.9 per cent
10 of their total billings would be their expenditures and
11 then, multiplied it by their gross billings, which I stated
12 earlier.

13 Q Now, Mr. Ellis, the exhibit which you just referred
14 to is a survey by a trade association of dental laborator-
15 ies, is that correct?

16 A Yes, it is.

17 Q And do you believe that that survey is definitive?

18 A I think so. I don't know of any other that would
19 have quite the extent of coverage. Laboratory data are not
20 easy to come by, I can tell you that.

21 Q Is it not true, Mr. Ellis, if you look at the
22 beginning of this publication, it indicates that the
23 responses upon which these figures were based were the
24 lowest responses to any survey ever made?

25 A Well, I don't know about "any survey ever made."

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2 Q By this organization. Would you look at the first
3 page?

4 (Pause)

5 A Yes. It says, "This is the smallest sampling
6 experienced in the history of the program." And it further
7 states, "It is adequate enough to provide useful information
8 about the dental laboratory industry."

9 Q There is no indication as to how many laboratories
10 this questionnaire was sent to.

11 A How many it was sent, mailed to?

12 Q There is no indication in this publication as to
13 how many companies were in fact surveyed, isn't that true?

14 A I don't see any readily. Frankly, I hesitate to
15 answer that without reading page for page. I don't see
16 it in that same section of the report.

17 Q It does indicate that these conclusions are based
18 on answers from 75 dental laboratories throughout the
19 United States.

20 A Yes.

21 Q That would be an average of one and a half labora-
22 tories per state, is that correct?

23 A Yes.

24 Q Now, I believe you stated in your affidavit that
25 there are 1300 dental laboratories just in the metropolitan

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JG Ellis-cross 665

New York area.

A That's what the dentist supply list has. However, I have seen data subsequent to that. At the time this affidavit was prepared, many figures were not available from the 1967 census of business. They published a report on dental laboratories which showed the count on all the laboratories in this New York metropolitan area with the exception of the two small counties over in New Jersey, Somerset and -- can you help me out with the other, the little county?

And I don't have the document, but I can testify under oath that the sales of those labs, according to the census in 1967, are actually higher than the billing figure I estimated in my affidavit. There are fewer labs shown on that report than the dentist supply list contained in my original affidavit.

Q But the number of labs in the area certainly numbers in the hundreds.

A Oh, certainly. I'm sure of that.

Q Do you think that a survey which is based on replies from an average of one and a half laboratories per state is a reliable survey to conduct such calculations on?

A I don't think anyone can answer that question, Mr. Sirignano. It depends entirely on the nature of the sample

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Ellis-cross

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it has drawn. It could or it could not.

Q Now, Mr. Ellis, I would like you to look at the American Dental Association publication upon which you determine the number of practicing or active dentists in the metropolitan New York area.

A I have it. Is this Plaintiff Exhibit 52?

O 52.

A I'm sorry. The tab has come off.

Q I would like to direct your attention to page 2 and page 3.

A I have it.

Q That indicates 99,500 active dentists in the United States, is that correct?

A Do you want me to read the sentence?

Q No, no. Isn't it correct that that indicates that there were 99,500 practicing dentists in the United States?

A Yes. And it further indicates that approximately 96,000 practice dentistry, that is, worked at the chair, and some 3,500 were engaged in teaching, research, administration and so on.

Q And how many in private practice?

A About 91,000.

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Q So as between active dentists, the number of dentists in private practice was some ten per cent lower than the number of active dentists, is that correct, in the United States?

A If by active you include teachers, researchers and so on, it would be about eight and a half per cent, I would figure.

Q Isn't there a figure there for active dentists?

A Yes. I read it. It says 99,500 were active in the profession.

Q 99,500 are active and --

A About 96,000 practice dentistry at the chair, while 3500 were engaged in teaching, research, administration, and 91,000 were in private practice.

Q I would like you to just compare the figure of active to private practice. Isn't it so that the figure there for dentists in private practice as compared to active dentists, that figure is some ten per cent less?

A I would make it eight and a half. It is a difference of 8,500 against a total of approximately a thousand.

Q What are those figures? 99--

A The figure you gave me is 99,500, and in private practice are 91,000. The difference is 8,500 on a total

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Ellis-cross

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of 100,000, is eight and a half per cent.

Q Now, Mr. Ellis, in all your calculations for expenditures in the metropolitan New York area you applied these expenditure figures to the figures from this source material of active dentists, didn't you?

A No, I did not. No, I did not. Last night, when I did the analysis for the United States --

Q I'm sorry --

THE COURT: Please.

Finish your answer.

A (Continuing) -- I did exactly the same method that I used in the New York area. I --

Q Didn't --

THE COURT: Wait. Have you finished?

THE WITNESS: No, sir.

THE COURT: All right. Go ahead.

A (Continuing) And the estimated number of dentists I got for the national total, using Public Health Service figures, the same data I used in New York, was 95,000. The publication here states that approximately 96,000 practice dentistry, that is, work at the chair.

I informed you yesterday that I had not done a national analysis based on these things previous to that.

Q Mr. Ellis, my question was not directed to the

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2 United States. My question was directed to your calculations
3 of purchases in the metropolitan New York market.

4 A I am telling you that if I used the data that I
5 used to reduce the number of dentists in the metropolitan
6 New York market consistently across all the states, I end
7 up with a total of 95,000. I cannot state that it was 99,000.

8 Q I am not asking any question with respect to
9 calculations about the United States. I am asking you to
10 look at your affidavit and tell me, did you not use the
11 figure which represented active dentists in metropolitan
12 New York?

13 A The data that I meant to use and that I indeed used
14 in numerical terms constitute an estimate of chairside prac-
15 ticing dentists. There is -- I listed in here -- a total
16 national figure of active dentists only to show that the
17 ratio was approximately the same as those given in the
18 Public Health Service data. I never used that figure, nor
19 did I in fact ever use that ratio. I used the Public Health
20 Service data consistently.

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2 Q Doesn't your affidavit state that the reduction
3 of fifteen per cent from total number of dentists represents
4 only a reduction to account for retired dentists? Would you
5 please read your affidavit, Mr. Ellis?

6 A That was my attempt. That is what I was attempting
7 to do.

8 Q In other words, you took the figure for total
9 dentists in Metropolitan New York and reduced it by the
10 fifteen per cent? That fifteen per cent reduction of total
11 dentists was to remove from your total figure retired
12 dentists?

13 A Well, what I have actually done is used the Public
14 Health Service ratios of active to retired -- I am sorry --
15 of total to active. If they included something other than
16 the retired dentists in their figures, then that is what
17 would be in the calculations I have made.

18 Q So the figure you ended up with after you removed
19 approximately fifteen per cent was active dentists, not
20 dentists in private practice?

21 A But it is, Mr. Sirignano, because on a national
22 basis, using precisely the same reduction ratios from the
23 Public Health Service reports, the same report I used for
24 the New York marketing area, I got 95,000 dentists. I did
25 that last night, at your request.

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1 MMP 2 Ellis - cross

2 Q I am talking about your calculations about the
3 New York --

4 THE COURT: Mr. Sirignano, I have heard
5 enough of this. You can make the argument to me. The whole
6 calculation is nothing but an argument. You can make it to me.
7 He is not contributing anything by his testimony. Now, let's
8 go on.

9 MR. SIRIGNANO: Your Honor, the defendant has not
10 put enough on the record for me to make an argument from the
11 material there.

12 THE COURT: Well, I can't make the defendant put
13 anything on the record. You can ask him questions, but please
14 discontinue this incessant argument.

15 MR. SIRIGNANO: Your Honor, may I have a five-minute
16 recess, please?

17 THE COURT: All right.

18 (Recess.)

19 MR. SIRIGNANO: No further questions.

20 THE COURT: Any redirect?

21 MR. JINKINSON: Very briefly, yes, your Honor.

22 First, your Honor, I would like to have the docu-
23 ments that Mr. Sirignano used in examining the witness.
24 They were marked for identification but not offered in
25 evidence.

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1 MMP 3 Ellis - redirect

2 Your Honor, the defendant is offering in evidence
3 pages 6 through 9 inclusive from Dr. Gort's affidavit, which
4 was used in the examination of the witness. We will mark it
5 Defendant's Exhibit M, I believe.

6 THE COURT: Any objection?

7 MR. SIRIGNANO: I object, your Honor, as to
8 relevance.

9 THE COURT: Is it true that you used this part of
10 the affidavit in cross-examination of the witness?

11 MR. SIRIGNANO: For the purpose of refreshing the
12 witness' recollection and nothing more.

13 THE COURT: Is it the witness' affidavit?

14 MR. JINKINSON: No; it is an affidavit of Dr. Gort.

15 THE COURT: I don't see how that would be admissible.
16 I will sustain the objection.

17 REDIRECT EXAMINATION

18 BY MR. JINKINSON:

19 Q I hand you the Dr. Gort --

20 MR. JINKINSON: Is this identified or marked in any
21 way?

22 MR. WEISS: I believe it is 48.

23 Q (Continuing) I hand you Plaintiff's Exhibit 48 for
24 identification. Did you read that affidavit before last night?

25 A This affidavit was prepared in --

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1 MMP 4 Ellis - redirect

2 THE COURT: No, no. Have you read it before last
3 night? Yes or no?

4 THE WITNESS: I don't think I have read it in its
5 entirety, your Honor.

6 Q Did you read any part of it before last night?

7 A Well, I talked to Dr. Gort on the telephone, and I
8 had access to some of the marketing figures that he used.
9 I didn't have access to all of it.

10 THE COURT: We are talking about the physical paper.

11 THE WITNESS: I didn't see it before last night,
12 I don't think. I don't have it in my files.

13 Q Did you read it last night?

14 A Yes.

15 Q What was Dr. Gort's estimate of distributor sales
16 in 1968?

17 MR. SIRIGNANO: Objection.

18 THE COURT: Sustained.

19 Mr. Sirignano, is any part of this in evidence?

20 MR. SIRIGNANO: No.

21 THE COURT: He says not. If there is any part of
22 this affidavit which is in evidence, it is now stricken. He
23 said that he used it solely to refresh the witness' recollec-
24 tion. That is what he told me. I can't remember. Therefore,
25 I say at this moment no part of the affidavit of Dr. Gort is

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1 MMP 5 Ellis - redirect

2 in evidence.

3 If any part of it has by any inadvertence been
4 marked and received in evidence, it is hereby and herewith
5 stricken.

6 Now let's go on.

7 Q Do you know what Dr. Gort's estimate of distributor
8 sales in 1968 was?

9 MR. SIRIGNANO: Objection, your Honor.

10 THE COURT: Sustained.

11 MR. JINKINSON: Your Honor, it seems to me that
12 yesterday the Government questioned this witness at great
13 length about the Dr. Gort affidavit and then finally got the
14 witness to admit that he accepted a figure of \$359,000,000 as
15 the sales of manufacturers and distributors in the year 1968,
16 as set forth in the Dr. Gort affidavit. It was not his
17 affidavit. They insisted upon the witness adopting that
18 figure.

19 Now, I think I have a right to cross-examine him on
20 the same affidavit that they read to him and used.

21 THE COURT: That question and answer are struck
22 out. Everything about the Gort affidavit is stricken out.

23 MR. JINKINSON: I have no further examination.

24 THE COURT: Any recross?

25 MR. SIRIGNANO: No, your Honor.

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1 MMP 6 Ellis -

2 THE COURT: All right, Mr. Ellis. Thank you. You
3 are excused.

4 (Witness excused.)

5 THE COURT: Next witness.

6 MR. SIRIGNANO: I would like at this time to move
7 to strike Defendant's Exhibits B, C, D, J and K, all of which
8 are based upon an American Dental Association survey which
9 has not been placed in evidence and of which there is nothing
10 in the record to serve as a foundation for those figures on
11 those exhibits.

12 THE COURT: I will reserve decision on that motion.
13 J O S E P H L A N D I , J R . , called as a witness by
14 the Defendant, being first duly sworn, testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. DeMARCO:

18 Q Mr. Landi, are you employed?

19 A Yes.

20 Q State where you are employed.

21 A I am employed at the Veterans Administration Hos-
22 pital, located at First Avenue and East 24th Street, in New
23 York City.

24 Q How long have you been employed there?

25 A I have been employed at that hospital for approxi-

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1 MMP 7 Landi - direct

2 mately fifteen years.

3 Q State your duties, please, at the Veterans
4 Administration Hospital.

5 A I am the chief in the purchase and contract section.

6 Q Have you been chief of the purchase and contract
7 section for the past fifteen years?

8 A Yes.

9 Q Among your duties are included the purchase of
10 dental equipment and supplies?

11 A That is correct.

12 Q Will you describe, please, how you make a purchase,
13 as chief of purchase at the hospital? Do you work pursuant
14 to certain rules and regulations, and, if so, what are they?

15 A Yes; we do. Our general policies for procurement
16 are contained in the Federal Procurement Regulations, which
17 are the regulations used by all Federal agencies.

B 2

18 Q What are those regulations, by name or number,
19 please?

20 A The regulations are, specifically, Federal Procure-
21 ment Regulation 1-1.301, Title Methods of Procurement.

22 Q Would you summarize briefly what those methods of
23 procurement are for Federal agencies and institutions?

24 A Yes. There has been established a priority listing
25 of courses of supply and, specifically, in the Veterans

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1 HMP 8 Landi - direct

2 Administration our first source of supply is Veterans
3 Administration excess; the second source of supply is items
4 due or available from our Veterans Administration supply depot
5 stocks; the third source of supply is other Government
6 agencies' excess; the fourth source, General Services Admini-
7 stration stocks; and the fifth source is Veterans Administration
8 decentralized contracts; our sixth source of supply is
9 mandatory Federal supply schedule contracts, the seventh,
10 Federal prison industry and blind-made products; and the
11 eighth and final, commercial concerns.

12 Q Mr. Landi, how many Veterans Administration
13 hospitals are there within the Metropolitan New York Area
14 that maintain dental facilities?

15 A To my knowledge, there are seven.

16 Q Do they all purchase, to your knowledge, now, pur-
17 suant to the same Veterans Administration rules and regula-
18 tions?

19 A Yes; they do.

20 Q Are you familiar with any other Federal institutions
21 besides Veterans Administration hospitals within the Metro-
22 politan New York Area?

23 A Military installations -- St. Albans Hospital --
24 I believe it is a Navy installation. Fort Hamilton, an
25 Army installation.

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1 MMP 9 Landi - direct

2 Q Do those institutions purchase pursuant to the same
3 regulations that you have described?

4 A To my knowledge, yes, they do.

5 Q Mr. Landi, with reference to the hospital where you
6 work, has that hospital recently engaged in renovation and
7 remodeling projects which caused you to make large expendi-
8 tures for new equipment and replacement of equipment?

9 A Yes.

10 Q Do you recall the project number?

11 A Yes. The project number is --

12 Q I believe it is 315691.

13 A That is correct.

14 Q Mr. Landi, I am handing you a document marked
15 Defendant's Exhibit I for identification. I ask you if you
16 can identify that document.

17 A Yes; I can. This is a summary of dental equipment
18 purchases for the Veterans Administration hospital for
19 dental service project number 315691.

20 Q When was that project engaged in, Mr. Landi?

21 A The project started late 1971, was completed June
22 6, 1973.

23 Q Referring to the second page of Defendant's Exhibit
24 I, can you describe for us what material is contained begin-
25 ning on the second page?

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1 MMP 10 Landi - direct

2 A Yes. This page lists by vendor name and address
3 the dollar amount of equipment ordered. This equipment, of
4 course, was the equipment purchased for this specific project.

5 Q I note an asterisk by some of the names. Can you
6 indicate what that means to you?

7 A Yes. The asterisk next to the vendor's name
8 indicates that these vendors are manufacturers.

9 Q And purchases in those instances were made directly
10 from the manufacturers?

11 A That is correct.

12 MR. DeMARCO: Your Honor, I would like to offer
13 Defendant's Exhibit I in evidence.

14 THE COURT: Has the Government seen it?

15 MR. DeMARCO: Yes; they were given a copy yesterday.

16 MR. LUBLINSKI: Objection on the grounds of rele-
17 vancy and materiality. I don't know who prepared this document,
18 your Honor.

19 MR. DeMARCO: I prepared the exhibit, and I am going
20 to ask the witness whether he has had an opportunity to
21 review it all this morning and whether he will adopt it.

22 THE COURT: You will lay a foundation for it.

23 MR. DeMARCO: I will state for the record, first of
24 all, I prepared the exhibit.

25 Q Have you had an opportunity to go over every entry

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1 MMP 11 Landi - direct

2 in the exhibit?

3 A Yes; I have.

4 Q Have you had an opportunity to review the tabulations
5 as to dollar amounts and so forth?

6 A Yes.

7 Q Have you had an opportunity to review all of the
8 exhibit and are you satisfied that this exhibit accurately
9 represents the purchases in dollar volume there with reference
10 to Project 315691?

11 A Yes.

12 THE COURT: The objection is overruled. The
13 exhibit will be received in evidence.

14 (Defendant's Exhibit I for identification was
15 received in evidence.)

xxx

EOT 3 am

25 613a

1 THE COURT: Now look at the first page, Mr. Landi.
2
3 You did not prepare it, but maybe you can explain it.
4
5 There is a total dollar volume of all your equipment purchases
6
7 for this dental service project, and then you have got
8
9 volume purchased directly from manufacturers, and that comes
10
11 to a dollar figure which is 86 percent of the total. And then
12
13 it's got volume purchased from vendors located beyond metro-
14
15 politain New York, and that comes to 71 percent.

16
17 But 71 percent and 86 percent add up to a good
18
19 deal more than a hundred percent, to me. I don't understand
20
21 the relationship between the volume purchased from manufact-
22
23 urers and the volume purchased from vendors located beyond
24
25 metropolitain New York. Do you understand it?

THE WITNESS: I, your Honor, did not compute the
percentage figures. I only identified the listing of vendors
and the dollaramounts. I did not do the percentage compu-
tation.

THE COURT: Can you tell me about that?

MR. De MARCO: Yes, I can. But first I would like
to ask him a question.

BY MR. De MARCO:

Q Mr. Landi, you indicated to me those entries to mark
as being manufacturers, did you not?

A Yes, I did.

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1 Q And they are correctly marked on the exhibit.

2 A That's correct.

3 MR. De MARCO: Your Honor, I believe I can ex-
4 plain it.

5 THE COURT: All right.

6 MR. De MARCO: The two entries are not meant
7 to relate. They are independent one from the other.

8 THE COURT: I see.

9 MR. De MARCO: One simply states the amount pur-
10 chased from manufacturers and the other one indicates the
11 dollar volume percentage purchased from beyond metropolitan
12 New York.

13 THE COURT: The manufacturers or dealers or mail
14 order houses or what not.

15 MR. De MARCO: That's correct.

16 THE COURT: I see. I understand.

17 BY MR. De MARCO:

18 Q Mr. Landi, can you indicate to his Honor some of the
19 sellers of dental products with whom you regularly deal?

20 A Yes. We deal with Silvermans, we deal with
21 Dentsply, we deal with Coe Laboratories, we deal with Ridder
22 Dental, S.S. White, Caulk, Dixon, Chayes, Coralite, Dental Ez,
23 Mid-West American. This is just a list I prepared out of
24 memory. There are at least six or eight more in addition to
25

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1 this, these names which I have mentioned.

2 These companies are under federal supply schedule
3 contracts. These are contracts that are promulgated by
4 the General Services Administration and they are for use of
5 all federal agencies.

6 Some of the local dental supply houses with whom
7 we deal are Walter Dental, City Dental, Rower Dental and
8 Durable Dental.

9 Q Among the list you just stated are a number of
10 mail order houses, is that correct?

11 A Yes.

12 Q Silvermans is one of them, is that correct?

13 A Yes.

14 Q Can you estimate for me the total amount of pur-
15 chases in any one year that your hospital alone makes in
16 sundries equipment, consumables, that is, from Silvermans?

17 A I estimate over the period of one year three to
18 four thousand dollars.

19 Q And I think you testified just a few minutes ago
20 there at least seven Veterans' Administration hospitals with
21 dental facilities?

22 A That's correct.

23 MR. De MARCO: No further questions. Your witness.
24

25 616a

1
2 BY THE COURT:

3 Q. You buy only for your hospital. You don't buy for the
4 other six.

5 A I buy only for the V.A. hospital at First Avenue
6 as well as the out-patient clinic of the Veterans' Administra-
7 tion Hospital located at 252 Seventh Avenue. And up until
8 June of this year the out-patient clinic located at 252 Seventh
9 Avenue had a dental clinic, which has since been consolidated
10 into the Veterans' Administration Hospital at First Avenue.

11 THE COURT: All right. Any cross examination?

12 CROSS EXAMINATION

13 BY MR. LUBLINSKI:

14 Q Mr. Landi, isn't it true that this project 31-5691
15 represented a one-shot deal for your Veterans' Administration
16 Hospital?

17 A That's correct.

18 Q When were these purchases of replacement and ad-
19 ditional equipment made by your hospital?

20 A The bulk of them was in the year 1972.

21 Q Were any made previously or subsequently?

22 A None previous, none subsequent. This listing
23 indicates the total amount of equipment purchased for this
24 specific project.

25 Q Had you been aware for a certain amount of time prior

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1 to 1972 that this appropriation would be made available?

2 A Yes, we were.

3 Q Isn't it true then in anticipation of this you
4 made very small purchases of dental equipment in the years
5 prior to 1972?

6 A Small purchases of equipment, yes, that is correct.

7 Q Can you give me an estimate of what your hospital's
8 purchases of dental products were in 1968?

9 A In 1968, approximately \$23,118.

10 Q Now, was that for both the facility you have now
11 and for another facility or just one of them?

12 A For two facilities, 252 Seventh Avenue and the
13 hospital at First Avenue, both facilities. I have responsib-
14 ility for both facilities.

15 Q Is the Seventh Avenue facility still in existence?

16 A It is not, not since June 6 of 1973.

17 Q What happened to it?

18 A The activities at 252 Seventh Avenue were con-
19 solidated into the hospital activities at First Avenue.

20 Q Can you give me an estimate of what your purchases
21 of dental products were in 1969?

22 A \$26,650.

23 Q And what were they approximately in 1970?

24 A In 1970, \$33,285.

25

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1 Q Can you estimate the number of full-time dentists
2 employed by the Veterans' Administration Hospital during
3 that time period, '68 through '70?

4 A Approximately 20.

5 Q And approximately what percentage of the total
6 dollar figures for dental product expenditures would be
7 attributable to purchases of equipment?

8 A I'd say no more than ten percent.

9 MR. LUBLINSKI: No further questions.

10 MR. De MARCO: Just two, your Honor

11 REDIRECT EXAMINATION

12 BY MR. De MARCO:

13 Q You stated that the project, purchases for which are
14 contained in the exhibit, was a one-shot deal. Is there
15 anything different in the percentage analysis of purchases
16 in that one-shot deal than your usual custom and practice in
17 making purchases for the hospital that you make purchases for?

18 Strike that. I will rephrase the question.

19 A Please do.

20 Q What I mean to ask is, while the project was a one-
21 shot deal, did you approach making purchases for that project
22 any differently than you do when you are buying equipment
23 and sundries generally?

24 A No, I didn't.

25 619a

1 Q One additional question. The equipment which
2 you purchase from manufacturers, as indicated in the chart,
3 who installed that equipment in the hospital?
4

5 A The equipment was installed by a construction con-
6 tractor. His name was Harvey Construction Corporation,
7 located here in New York City.

8 MR. De MARCO: No further questions.

9 THE COURT: Recross?

10 MR. LUELLINSKI: No.

11 THE COURT: All right. Thank you, Mr. Landi. You
12 may be excused.

13 (Witness excused.)

14 MR. JINKINSON: Your Honor, our discussion yester-
15 day regarding Mr. Sandler we told you that he was out of
16 town. We got a hold of him last night. He had no time to
17 get the records that the government wants. He is looking
18 for them. So we have no further witnesses except Mr. Sandler,
19 if he goes on Monday, and Dr. Gould.

20 I would like to put Dr. Gould on last, and after
21 we have had an opportunity to read the cross examination of
22 Mr. Ellis, which is not completely typed up. So we would like
23 to discontinue for the day and come back Monday and finish
24 up, probably in the morning.

25 THE COURT: But we can start on Monday and finish

* * * *

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